

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-1051

PARIS ADULT THEATRE I, ET AL,
Petitioners,

v.

LEWIS R. SLATON, DISTRICT ATTORNEY
ATLANTA JUDICIAL CIRCUIT, ET AL.,
Respondents.

ON WRIT OF CERTIORARI FROM THE
SUPREME COURT OF GEORGIA

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1703

IN THE SUPREME COURT OF GEORGIA

No. 71-1051

Decided: Nov. 5, 1971

SLATON, District Attorney, Et Al.

v.

PARIS ADULT THEATER I, Et Al.**OPINION OF SUPREME COURT OF GEORGIA**

The films involved in this case are hard core pornography. Their commercial exhibition is not protected by the first amendment, and the trial court erred in refusing to enjoin their exhibition in a theater where all adult persons willing to pay the price were admitted.

HAWES, Justice. The appeal in this case is from the judgment and order of the Superior Court of Fulton County refusing a temporary injunction against the showing by the defendants, Paris Adult Theater No. 1 and Paris Adult Theater No. 2, of two allegedly obscene motion pictures. Following the procedure approved by this court in *Evans Theater Corp. v. Slaton*, 227 Ga. 377 (180 SE2d 712), and followed in *Walter, et al. v. Slaton*, 227 Ga. 676 (182 SE2d 464), and in *1024 Peachtree Corp., et al., v. Slaton* [No. 26612; decided _____]. *Lewis R. Slaton*, as District Attorney of the Atlanta Judicial Circuit, and *Hinson McAuliffe*, as Solicitor General of the Criminal Court of Fulton County, filed a complaint against the theaters and named individuals praying for a rule nisi to require the defendants, to show cause on a date certain why the motion picture films, "It All Comes Out in the End," and "Magic Mirror," should not be declared obscene and subject to be seized, and seeking in each case an

order requiring the defendants to produce the aforesaid motion picture films and that they be temporarily and permanently enjoined from exhibiting the same. The rule nisi was duly issued and served in each case, and an adversary hearing was held pursuant thereto on January 13, 1971 before a Judge of the Superior Court of Fulton County. The parties agreed to waive a jury trial and a preliminary hearing and stipulated that the judgment and order entered by the trial judge would be a final judgment and order in each case. After viewing the motion pictures and hearing the evidence, the trial judge rendered the following judgment. "The State contends that the motion pictures under review in the above actions are obscene. The titles of the films are, "It All Comes Out in the End," and "Magic Mirror." Assuming that obscenity is established by a finding that the actors cavorted about in the nude indiscriminately, then these films may fairly be considered obscene. Both films are clearly designed to entertain the spectator and perhaps, depending on the viewer, to appeal to his or her prurient interest. The portrayal of the sex act is undertaken; but the act itself is consistently only a simulated one if, indeed, the viewer can assume an act of intercourse or of fellatio is occurring from the machinations which are portrayed on the screen. Each of the films is childish, unimaginative, and altogether boring in its sameness.

"It appears to the Court that the display of these films in a commercial theater, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible.

"IT IS THE JUDGMENT OF THIS COURT THAT the films, even though they display the human body and the human personality in a most degrading fashion, are not obscene.

"The actions against the Defendants, therefore, are dismissed.

"This 12th day of April, 1971.

Jack Etheridge, Judge,
Superior Court of Fulton County,
Atlanta Judicial Circuit."

The appeal is from this order. The grounds of enumerated error are that the court erred in declaring each of the films to be not obscene, in refusing to enjoin the defendant from exhibiting each of said motion pictures, and in dismissing the appellant's complaint against the defendants.

Appellees contend, and the judge of the superior court found that, inasmuch as the evidence in this case shows that the films which the solicitor seeks to seize are shown in a theater which carries on the front thereof the warning that it is for adults only and that "You must be 21 and able to prove it. If viewing the nude body offends you — PLEASE DO NOT ENTER," the exhibition of the films in this context is permissible and that the State cannot, without violating first amendment rights, constitutionally prohibit it. They rely in support of this position upon the case of *Stanley v. Ga.*, 394 U.S. 557, and other Federal and State cases following it. That case, however, is not authority for the position which appellees take. It dealt, not with the commercial distribution of pornography, but with the right of Stanley to possess, in the privacy of his home, pornographic films. In one of the most recent, if not *the* most recent, case decided by the Supreme Court of the United States dealing with this kind of material that court has expressly limited the scope of *Stanley* and has thereby effectively answered this contention of the appellees. *U.S. v. Reidel*, U.S. , 28 L.Ed. 2d 813, 91 S. Ct. . That case involved the distribution through the mails of an admittedly obscene publication in violation of 18 U.S.C. § 1461. The material was mailed to recipients who responded to a newspaper advertisement which required the recipient to state in his order therefor that he was 21 years of age. *Reidel* was indicted, but the trial court granted his motion to dismiss

the indictment and, upon review, the Supreme Court, in reversing that judgment, reiterated the ruling in *Roth v. U.S.*, 354 U.S. 476, 1 L. Ed.2d 1498, 77 S. Ct. 1304, that "obscenity is not within the area of constitutionally protected speech or press." In so ruling, the Supreme Court expressly held that the government could constitutionally prohibit the distribution of obscene materials through the mails, even though the distribution be limited to willing recipients who state that they are adults, and, further, that the constitutional right of a person to possess obscene material in the privacy of his own home, as expressed in *Stanley*, does not carry with it the right to sell and deliver such material. As we view the holding in the *Reidel* case, it is dispositive of the appellees' contention, and the ruling of the trial court that the showing of these films in a commercial theater under the circumstances shown in this case is constitutionally permissible. The defendants in this case were making sales and delivery of the films involved in the only practical way in which it could be done, that is, by selling to the public the right to come into their theater and view the showing of such films. No reason exists why the sale and delivery of these films should be immune to State control any more than the sale and delivery of multiple copies of an obscene book, pamphlet or magazine. Those who choose to pass through the front door of the defendant's theater and purchase a ticket to view the films and who certify thereby that they are more than 21 years of age are willing recipients of the material in the same legal sense as were those in the *Reidel* case, who, after reading the newspaper advertisements of the material, mailed an order to the defendant accepting his solicitation to sell them the obscene booklet involved there. That case clearly establishes once and for all that the sale and delivery of obscene material to willing adults is not protected under the first amendment.

Appellee also contends, and the trial judge so found, that the sexual activity depicted in these films is merely simulated, and that, being such, it is not obscene. This contention was

unhesitatingly and utterly reject. True, the activity in the films here involved is not revealed in the explicit detail embodied in the films in the Walter case. But, we held in the Evans Theater case that, "I am Curious Yellow," depicted hard core pornography. In that case, only simulated sexual activity was involved. The films in this case leave little to the imagination. It is plain what they purport to depict, that is, conduct of the most salacious character. We hold that these films are also hard core pornography, and the showing of such films should have been enjoined since their exhibition is not protected by the first amendment.

Judgment reversed. All the Justices concur.

SUPREME COURT OF GEORGIA

Atlanta, November 5, 1971

JUDGMENT OF SUPREME COURT

The Honorable Supreme Court met pursuant to adjournment.

The following judgment was rendered:

Lewis R. Slaton, District Attorney, et al. v. Paris Adult Theatre I, et al.

This case came before this court upon an appeal from the Superior Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed for the reasons stated in the opinion this day filed. All the Justices concur.

BILL OF COSTS, \$30.00

**Supreme Court of the State of Georgia
Clerk's Office, Atlanta, December 20, 1971**

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that Thomas E. Moran paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Hazel E. Hallford, Deputy Clerk.

**IN THE SUPREME COURT OF
THE STATE OF GEORGIA**

No. 26631

LEWIS R. SLATON, as District Attorney, et al.,
Appellants

v.

PARIS ADULT THEATRE I, et al
Appellees.

LEWIS R. SLATON, as District Attorney, et al.,
Appellants,

v.

PARIS ADULT THEATRE II, et al
Appellees.

**MOTION FOR REHEARING
IN SUPREME COURT**

NOW COME the Appellants in the above-entitled case and file this their Motion for a Rehearing upon the following grounds:

1. The Court overlooked a stipulation in the record by the attorneys for all parties which waived a jury trial and provided for a final judgment to be rendered by the trial court judge.
2. The Court overlooked the decision of U.S. v. Wild, 422 Fed. 2d 34, certiorari denied April, 1971, which is controlling as authority in this case in that the motion pictures involved herein are hard core pornography as a matter of law and the judgment of the trial court should be reversed on this authority.

WHEREFORE, Movants pray that a rehearing be granted and the decision rendered amended accordingly.

/s/
Thomas E. Moran.

(Certificate of Service omitted in printing)

MOTION FOR REHEARING
IN SUPREME COURT

NOW COME the Appellants in the above-entitled case and file this their Motion for a Rehearing upon the following grounds:

1. The Court overlooked a stipulation in the record by the attorneys for all parties which waived a jury trial and provided for a final judgment to be rendered by the trial court judge.

2. The Court overlooked the decision of U.S. v. White, 421 Fed. 2d 34, certiorari denied April, 1971, which is controlling authority in the case in that the motion picture involved herein was held copyrightable as a matter of law and the judgment of the trial court should be reversed on this authority.

**IN THE SUPREME COURT OF
THE STATE OF GEORGIA**

Case No. 26631

APPELLEES' PETITION FOR REHEARING

Suite 507

ROBERT EUGENE SMITH

102 West Pennsylvania Ave.

Towson, Maryland 21204

Suite 2005,

D. FREEMAN HUTTON

One Hundred Colony Square,

Atlanta, Georgia 30309

Attorneys for Appellees.

Petitioners-Appellees herein respectfully submit to the Court that:

I.

Appeal in this matter was argued before this Court and the opinion of this Court was filed on November 5, 1971, reversing the findings of the Honorable Jack Etheridge, Judge, Fulton Superior Court.

II.

This Honorable Court, in reversing the findings of the lower Court, considered and treated in the Opinion of the Court, in part, the following:

1.

"Appeal in this case is from the judgment and order of the Superior Court of Fulton County refusing a temporary

injunction against the showing by the defendants, Paris Adult Theater No. 1 and Paris Adult Theater No. 2, of two allegedly obscene motion pictures." (Emphasis Supplied.) (See page 1 of the Opinion of this Court)

"As was pointed out in *Walter v. Slaton*, *supra*, the initial hearing in this kind of proceedings presents for the judge's decision only the question of whether there is probable cause to hold the material in question to be obscene, and, therefore, whether the exhibition of a motion picture or the distribution of literature shall be *temporarily enjoined* until the ultimate question of obscenity can be passed upon by a jury." (Emphasis Supplied.) (See page 3 of the opinion of this Court)

"[A]n issue of fact as to whether the films are obscene, . . . was a question which, under our procedure, necessarily *had to be submitted to the jury upon the final determination of the case* . . ." (Emphasis Supplied.) (See page 5 of the Opinion of this Court)

4.

"As we view the holding in the *Reidel* case, it is dispositive of the Appellees' contention, and the ruling of the trial court that the showing of these films in a commercial theater under the circumstances shown in this case is constitutionally permissible . . . that case [*Reidel*] clearly establishes once and for all that the sale and delivery of obscene material to willing adults is not protected under the First Amendment." (See pages 7 and 8 of the Opinion of this Court.)

"[I]t is apparent that a *temporary injunction* was necessary in order to protect the jurisdiction of the court and to prevent the case from becoming moot. It follows that the trial judge erred in denying the *temporary injunction*." (Emphasis supplied.) (See page 11 of the Opinion of this Court)

III.

This Court rendered its decision predicated upon a factual assumption which was incorrect and that factual assumption was that the matter presented to the lower court judge related to the issuance of a temporary, or interlocutory, injunction, which in truth and fact Counsel for both Appellants and Appellees, at the trial level, stipulated that the hearing before the lower court was in the nature of a final determination of all the matters presented. See paragraph 1 of the Stipulation of Record contained on page 1 of the Brief of Appellants filed by Messrs. Moran, Endictor, McAuliffe, and Moran.

IV.

Counsel for Appellees did not urge for consideration by this Court any contention conceding that the materials were obscene, but that a constitutional right to offer the same for dissemination exists, as was done by counsel in *Reidel*. The difference between *Reidel* and two cases participated in by Counsel for Appellees here in the United States Supreme Court was that in *Reidel* and *Thirty-Seven Photographs*, there was in the record a clear concession that the material was obscene by any test applied by any of the members of the Court, including the variable concept of obscenity.

The two cases in which this Counsel participated in and were the subject of a *per curiam Redrup* reversal were *Bloss v.*

Michigan, decided the same day as *Reldel* and *Thirty-Seven Photographs* by the United States Supreme Court, in which a conviction for violation of the obscenity laws in showing a movie in a public theater to adults only, which motion picture is similar in content to the motion pictures before this Court in the present case, was set aside; the other case is *Burgin v. State of South Carolina*, which case has been discussed in Appellees' Supplemental Briefs heretofore furnished the Court and said case was reversed on October 12, 1971.

V.

It is submitted that this Honorable Court has overlooked and misconstrued a material fact in the record which is controlling as authority and which would require a different judgment from that rendered, and further this Court has erroneously construed the petition of Appellees on the law in the premises.

CONCLUSION

It is urged on this Honorable Court that there are grave constitutional questions as yet unanswered, which Appellees have raised herein by this *Petition for Rehearing*, due either to the Court having misconstrued a basic factual premise and/or because the Court may have misapprehended the various propositions advanced by Appellants and Appellees.

WHEREFORE, Petitioners pray that the Court allow a rehearing in this matter so that the issues set forth hereinbefore may be duly considered.

ROBERT EUGENE SMITH, Esq.

D. FREEMAN HUTTON, Esq.

Attorneys for Appellees.

CERTIFICATE OF COUNSEL

I hereby certify that I have reviewed the decision of this Honorable Court, rendered November 5, 1971, and it is the belief of Counsel that a basic, underlying fact has been overlooked and points of law and controlling authority have been erroneously construed or misapplied.

ROBERT EUGENE SMITH, Esquire.

(Certificate of Service omitted in printing)

THE HONORABLE COURT OF APPEALS OF THE STATE OF GEORGIA
 ROBERT EUGENE SMITH, Esquire
 CLIFF JERRY, FRED PRICHARD, JOE VALLIN
 The following order was prepared:
 Case No. 12,000, State of Georgia vs. Paul Adam
 Theatre 1, 21 at
 LUIS R. SLATON, Jr., District Attorney
 Upon consideration of the motion for a rehearing filed in
 this case it is ordered that the same be denied.
 Attest: Clerk of the State of Georgia
 Clerk's Office, Atlanta, February 22, 1972
 H. STANTON LINDA KING
 I hereby certify that this is a true and correct copy of the
 original of the above order of the Honorable Court of Appeals of the State of Georgia.
 Witness my signature and the seal of said court herein
 affixed this day and date above written.
 ROBERT EUGENE SMITH
 Counsel for the State of Georgia
 Georgia, January 22, 1972

**IN THE SUPREME COURT OF
THE STATE OF GEORGIA**

No. 26631

(Title omitted in printing)

ORDER ON MOTIONS FOR REHEARING

SUPREME COURT OF GEORGIA

Atlanta, November 18, 1971

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Lewis R. Slaton, District Attorney, et al. v. Paris Adult Theatre, I, et al.

Upon consideration of the motions for a rehearing filed in this case, it is ordered that they are hereby denied.

**Supreme Court of the State of Georgia,
Clerk's Office, Atlanta, February 25, 1972**

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

**Hazel E. Hallford,
Deputy Clerk.**

Attorney for Appellee

**IN THE SUPERIOR COURT
FOR THE COUNTY OF FULTON
STATE OF GEORGIA**

Civil Action No. B61298

**LEWIS R. SLATON, As District Attorney,
Atlanta Judicial Circuit and
HINSON MCAULIFFE, as Solicitor General of
the Criminal Court of Fulton County,
Plaintiffs,**

v.

**PARIS ADULT THEARTE I
ROBERT MITCHEM, PHILLIP A. FISHMAN,
CLIFF TERRY, FRED PRICHARD, JOE BALLEW,
Defendants.**

Civil Action No. B61299

**LEWIS R. SLATON, As District Attorney,
Atlanta Judicial Circuit and
HINSON MCAULIFFE, As Solicitor General of the
Criminal Court of Fulton County,
Plaintiffs,**

v.

**PARIS ADULT THEATRE II,
ROBERT MITCHEM, PHILLIP A. FISHMAN
CLIFF TERRY, FRED PRICHARD, JOE BALLEW,
Defendants.**

NOTICE OF APPEAL

Notice is hereby given that each of the above named Plaintiffs hereby appeals to the Supreme Court of the State of Georgia from the order of this Court on April 12, 1971

finding and declaring that the motion picture films entitled "IT ALL COMES OUT IN THE END" and "MAGIC MIRROR" are not obscene, and refusing to enjoin the exhibition of said motion picture films.

The Clerk should transmit the entire record including the transcript, documents, films and nothing should be omitted.

This the 20th day of April, 1971:

W. BAER ENDICTOR

Attorney for Plaintiffs.

160 Pryor Street, S.W.
Atlanta, Georgia, 30303
572-2911

GEORGIA, Fulton County, Clerk's Office Superior Court
Filed for Record 20 day of April 1971.
Recorded April 22, 1971

/s/ Clerk

(Certificate of Service omitted in printing)

**IN THE SUPERIOR COURT FOR THE
COUNTY OF FULTON
STATE OF GEORGIA**

Civil Action No. B 61298

Civil Action No. B 61299

(Title omitted in printing)

NOTICE OF APPEAL' - Filed April 20, 1971

NOW COME the Plaintiffs in the above entitled cases, and within thirty (30) days from the entry of the Order and Final Judgment herein appealed from, amend their Notice of Appeal so that as perfected the said Notice of Appeal shall read as follows:

Notice is hereby given that each of the above named Plaintiffs do hereby appeal to the Supreme Court of the State of Georgia from the Order and Final Judgment of the Fulton County Superior Court entered in the above entitled cases and dated April 12, 1971, finding and declaring that the motion picture films entitled "IT ALL COMES OUT IN THE END" and "MAGIC MIRROR" are not obscene and dismissing Plaintiffs' Complaint against each of the above named Defendants, and refusing to enjoin the Defendants from exhibiting each of the said motion picture films.

The Clerk of the Superior Court shall transmit the entire record in each of the aforesaid cases, including the transcript, documents, and films and nothing shall be omitted.

This the Day of May, 1971.

/s/

THOMAS E. MORAN

/s/

W. BAER ENDICTOR
Attorneys for Plaintiffs.

GEORGIA, Fulton County, Clerk's Office Superior Court
 Filed for Record 4 day of May, 1971
 Recorded May 5, 1971

/s/ Clerk

(Certificate of Service omitted in printing)

NOTICE OF APPEAL - Filed April 20, 1971

NOW COMES the Plaintiff in the above entitled case, and within thirty (30) days from the entry of the Order and Final Judgment herein appealed from, and the Plaintiff shall Appeal so that as perfected the said Notice of Appeal shall read as follows:

Plaintiff do hereby appeal the Superior Court of the State of Georgia from the Order and Final Judgment of the said Court entered in the above entitled case and dated April 12, 1971, finding and declaring that the motion picture film entitled "ALL COMES OUT IN THE END" and "MAGIC MIRROR" are not obscene and dismissing Plaintiff's Complaint against each of the above named Defendants and refusing to enjoin the Defendants from exhibiting each of the said motion picture films.

The Clerk of the Superior Court shall transmit the entire record in each of the above cases, including the transcript, documents, and films and nothing shall be omitted.

This the 10 day of May, 1971 at

THOMAS E. MORAN

W. BAER ENDICOTT

Attorneys for Plaintiff

**IN THE SUPERIOR COURT FOR THE
COUNTY OF FULTON
STATE OF GEORGIA**

Case No. B 61298

**LEWIS R. SLATON, As District Attorney,
Atlanta Judicial Circuit and
HINSON MCAULIFFE As Solicitor General
of the Criminal Court of Fulton County,
Plaintiffs
v.**

**CLIFF TERRY - FRED PRITCHARD
PARIS ADULT THEATREI
ROBERT MITCHEM - JOE BALLEW
PHILLIP A. FISHMAN,
Defendants.**

**COMPLAINT TO DECLARE MOTION PICTURE
ENTITLED "IT ALL COMES OUT IN THE END"
OBSCENE AND SUBJECT TO SEIZURE
(Filed December 28, 1970)**

Plaintiffs show that LEWIS R. SLATON is the District Attorney of the Atlanta Judicial Circuit, Atlanta, Fulton County, Georgia, and that HINSON MCAULIFFE, is the Solicitor General of the Criminal Court of Fulton County

-1-

That the defendants do business as, own and operate Paris Adult Theatre I, 320 Peachtree St., N.E. Atlanta, Fulton County, Georgia, and exhibit for an admission fee certain motion picture films to members of the public.

-2-

That defendant Robert Mitchem is President of and defendant Phillip A. Fishman is the Manager of and operates and conducts the business of the Paris Adult Theatre I for the benefit of said corporation.

-3-

That the defendants are in joint control and possession of a certain motion picture film, entitled "IT ALL COMES OUT IN THE END" and is showing this film at the said theatre to the public on a fee basis.

-4-

That the defendants did on the 28th day of December, 1970, show said film to the general public and will continue to show the said film for an indefinite period of time unless precluded by this Court from so doing.

-5-

That the exhibition of the motion picture film entitled "IT ALL COMES OUT IN THE END" at the Paris Adult Theatre I, in Atlanta, Fulton County, Georgia, constitutes a flagrant violation of Georgia Code Section 26-2101 in that the sole and dominant theme of the said motion picture film considered as a whole and applying contemporary community standards appeals to the prurient interest in sex, nudity and excretion, and that the said motion picture film is utterly and absolutely without any redeeming social value whatsoever, and transgresses beyond the customary limits of candor in describing and discussing sexual matters.

-6-

Plaintiffs show that under the present interpretation of the law applied to such matters and adversary hearing to

determine the question of obscenity must first be had prior to a seizure of such film and the destruction thereof.

WHEREFORE, Plaintiffs respectfully demand:

(a) That the defendants and each of them be served with a copy of this complaint as provided by law;

(b) That a Rule Nisi issue requiring the defendants and each of them to show cause on a date certain why the motion picture film "IT ALL COMES OUT IN THE END" should not be declared obscene and subject to be seized by the DISTRICT ATTORNEY of this Circuit or by the SOLICITOR GENERAL of the Criminal Court of Fulton County, and the defendants be directed to have and produce upon the said hearing the motion picture film "IT ALL COMES OUT IN THE END";

(c) That the motion picture film "IT ALL COMES OUT IN THE END" be declared obscene and subject to seizure;

(d) That the Defendants and each of them be temporarily and permanently enjoined from exhibiting the motion picture film "IT ALL COMES OUT IN THE END" within the jurisdiction of this Court.

(e) That the defendants and each of them be temporarily restrained and enjoined from destroying, altering, concealing or removing the motion picture film "IT ALL COMES OUT IN THE END" without the jurisdiction of this Court.

(f) That Plaintiffs have such other and further relief as this Court may deem mete and proper.

W. BAER ENDICTOR,
Assistant Solicitor Criminal Court
of Fulton County
Attorney for Plaintiffs.

/s/

TONEY HIGHT,

Assistant District Attorney,
 Atlanta Judicial Circuit
 Attorney for Plaintiffs.

GEORGIA**FULTON COUNTY**

Before me the undersigned attesting officer duly authorized to administer oaths personally appeared HINSON MCAULIFFE, who, after being duly sworn deposes and says that the facts contained in the within and foregoing complaint are true and correct.

/s/ (Illegible)

Sworn to and Subscribed before me this the 28th day of December, 1970.

James L. Webb.

ORDER

The within and foregoing complaint read and considered let the same be filed.

Let the Defendants and each of them show cause if any they have before the Presiding Judge of this Court on the 7 day of January, 1971, at 2:00 o'clock P.M., then and there to be heard why the prayers of the Plaintiffs' should not be granted and the motion picture film "IT ALL COMES OUT IN THE END" be declared obscene.

It is further ordered that the Defendants have and produce before the Court at the date and time aforesaid one print each of the motion picture film "IT ALL COMES OUT IN THE END" as it was exhibited to the general public on the 28th day of December, 1970, together with the proper equipment for exhibiting and viewing the same.

In the meantime and until further order of this Court, the defendants and each of them are temporarily restrained and enjoined from concealing, destroying, altering or removing the motion picture film "IT ALL COMES OUT IN THE END" without the jurisdiction of this Court.

Let the Sheriff of Fulton County serve a copy of the within and foregoing summons and complaint together with a copy of this Order upon each of the defendants as provided by law.

Done this the 28th day of December, 1970, at 2:24 o'clock, P.M.

/s/ (Illegible)

JUDGE SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT

THE SUPERIOR COURT FOR THE COUNTY
OF FULTON, STATE OF GEORGIA

Civil Action, File Number B61298

LEWIS R. SLATON, District Attorney
HINSON MCAULIFFE, Solicitor General

v.
PARIS ADULT THEATRE I, CLIFF TERRY,
JOE BALLEW, ROBERT MITHEM,
PHILLIP A. FISHMAN, FRED PRICHARD

SUMMONS

To the above-named Defendant:

You are hereby summoned and required to file with the clerk of said court and serve upon W. Baer Endictor, plaintiff's attorney, whose address is 160 Pryor St., an answer to the complaint which is herewith served upon you, within 30 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

This 28, Day of Dec. 1970.

/s/
Deputy Clerk

(Filed in Office, Dec. 28, 1970)

GEORGIA, FULTON COUNTY,

I have this day served the Defendant JOE BALLEW personally with a copy of the within complaint and summons.

This Dec. 28, 1970.

At 3:40 P.M.

Investigator, Deputy Sheriff
Criminal Court,
Fulton County, Ga.

GEORGIA, FULTON COUNTY

I have this day served the Defendant Fred Pritchard personally with a copy of the within petition and process.

This Dec. 28, 1970

at 3:40 P.M.

C.R. Little, Investigator
Criminal Court, Fulton County, Ga.

GEORGIA, FULTON COUNTY

I have this day served the Defendant Cliff Terry personally with a copy of the within petition and process.

**This Dec. 28, 1970.
at 3:40 P.M.**

C.R. Little, Investigator
Criminal Court, Fulton County,
Ga.

D. FREEMAN HUTTON
ATTORNEY AT LAW

SUITE 3017 First National Bank Tower

Atlanta, Georgia 30303

Phone 404 523-5339

January 4, 1971

Book 2546 page 312

Mr. J.W. Simmons, Clerk
Superior Court of Fulton County
Fulton County Courthouse
136 Pryor Street, S.W.
Atlanta, Georgia 30303

Re: B-61298

Slaton and McAuliffe

vs.

Paris Adult Theatre I, et al.

Dear Mr. Simmons:

This is to certify that on January 4, 1971 I personally served Hinson McAuliffe, Plaintiff in the above styled action, with a subpoena requiring him to appear as a witness in Room 603, Fulton County Courthouse on January 7, 1971, at 2:00 p.m.

Please have said service entered on the docket. Thank you for your assistance.

Sincerely yours,
D. Freeman Hutton
D. Freeman Hutton

DFH:bjh

Georgia, Fulton County, Clerk's
Office Superior Court
Filed for Record 5 day of Jan. 1971
Recorded Jan. 6, 1971
J.W. Simmons Clerk.

**IN THE SUPERIOR COURT FOR THE
COUNTY OF FULTON
STATE OF GEORGIA**

Civil Action B-61298

**LEWIS R. SLATON, As District Attorney,
Atlanta Judicial Circuit, and
HINSON MCAULIFFE, As Solicitor General
of the Criminal Court of Fulton County,**

vs.

**PARIS ADULT THEATRE I
ROBERT MITCHEM, PHILLIP A. FISHMAN,
CLIFF TERRY, FRED PRICHARD, and JOE BALLEW**

Civil Action B-61299

**LEWIS R. SLATON
HINSON MCAULIFFE**

vs.

**PARIS ADULT THEATRE II
ROBERT MITCHEM, PHILLIP A. FISHMAN,
CLIFF TERRY, FRED PRICHARD, and JOE BALLEW**

**BRIEF IN SUPPORT OF MOTIONS TO
DISMISS OF DEFENDANTS TERRY,
PRICHARD AND BALLEW**

(Filed April, 12, 1971)

I.

**THE ONLY STATUTORY PROCEDURE BY WHICH
DEFENDANTS CAN CONCEIVABLY BE
COMPELLED TO PRODUCE THE FILMS IS
OUTLINED IN GEORGIA CODE ANNOTATED
§81A-134 AND PLAINTIFFS HAVE NOT MADE
THE REQUISITE SHOWING UNDER THAT
SECTION.**

It has become clear that there must be a prior adversary proceeding before there can be seizure of allegedly obscene materials. *FREEDMAN V. MARYLAND*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed.2d 649 (1965), *TIETEL FILM CORPORATION V. CUSACK*, 390 U.S. 139, 88 S. Ct. 754, 19 L. Ed.2d 966 (1968). However, there is no statute in Georgia which governs the procedure to be used in such a hearing or which provides authority for one while providing safeguards against intrusions into areas protected by the First Amendment to the United States Constitution. Some support for a show cause hearing is provided by *dictum* in *Gable v. Jenkins*, 305 F. Supp. 998, fn. 3 at 1001 (1969) but this is not the "authoritative judicial assurance" required by *Freedman v. Maryland*, *supra*,

Therefore, it is apparent that the procedure being employed here by the Plaintiffs is in reality a Motion to Produce pursuant to Georgia Code Annotated §81A-134 (Civil Practice Act. §34). It is obvious from a comparison of the provisions of that Code section and the complaints in these cases that the Plaintiffs have not met the requirements of said Code section.

First, Georgia Code Annotated §81A-134 provides that the moving party must make a showing of good cause before he will be allowed to inspect the documents or things. It has been held that if the moving party can get the information it needs without resorting to the discovery process, good cause does not exist. *UNCLE BEN'S, INC. V. UNCLE BEN'S PANCAKE HOUSES, INC.*, 30 F.R.D.506 (D. TEX.). No showing has been made that any attempt to obtain the films elsewhere was made by the Plaintiffs.

Nor has the motion of the Plaintiffs been accompanied by a supporting affidavit showing that the Defendants before the Court have the possession, custody and control of the films required by §34 of the Civil Practice Act.

Received Jan. 5, 1971

J.W. Thompson Clerk

In a case decided under the Federal Rule of Civil Procedure from which our rule was derived it has been held that:

"The rule permitting compelled production of corporate records by their custodian may be invoked only against the party who is in fact the custodian of the records in question." *Brussel v. U.S.*, 396 U.S. 1229, 90 S. Ct. 24 L. Ed. 2d 53 (1969).

On the question of whether the Civil Practice Act applies in a case such as this (a civil action) see Georgia Code Annotated §81A-101 which states "This Title governs the procedure in all courts of record... in all suits of a civil nature..., with the exceptions stated in section 81 A-181." There are no applicable statutory procedures as contemplated in § 81A-181 so the Civil Practice Act must apply.

Section 81A-181 refers to special statutory proceedings which this is not.

Based on the above the Plaintiffs have not shown facts sufficient to warrant an order requiring the production of the films.

II.

SERVICE UPON BALLEW, PRICHARD AND TERRY CANNOT REQUIRE EITHER OR ALL OF THEM TO PRODUCE THAT OVER WHICH THEY HAVE NO CONTROL AND THEIR FAILURE TO PRODUCE THE DESIGNATED FILMS CANNOT BE THE BASIS OF COURT IMPOSE SANCTIONS ABSENT A SHOWING THAT THEY ARE AUTHORIZED TO DO SO BY THEIR RELATIONSHIP WITH THEIR PRINCIPAL.

The Defendants before the Court cannot be expected to do that which they have no authority to do, as between them and their principal, in regard to the movies made the subject to the orders of this Court dated December 28, 1970.

Obviously, the only people who can be compelled to produce the films are those who are custodians, as stated in *Brussel v. U.S.*, *supra*.

The defendants before the Court do not have such custody and control over the film as would allow them to deal with the films in a way contrary to the wishes of their principal. Clearly, destruction of the films is not in the best interests of the business of the Paris Adult Theatre I & II as seizure of the films and a decision that they are obscene could subject the party producing them to criminal prosecutions as well as result in their destruction and a consequent breach of contract action by the distributor of the films. For the agents of a proprietor who is himself named a party to the suit to be asked to make a decision as to whether to surrender the films is to make them exercise ultimate managerial control over the business; a control which has not been shown to exist and can't be presumed. Even though an agent is presumed to have power to do anything "within the scope of the business", breaching a contract or providing what might be the basis of a prosecution for a crime is not within the scope of the business. The agent's authority, extends solely to those acts which the principal manifestly intends to be performed by the agent. Georgia Code Annotated §4-101.

Nor can Joe Ballew be required to produce the films solely because he is a "manager" unless he in fact has the broad powers which he might be presumed to have. Such a presumption can be rebutted and the Court should look to the actual scope of the agent's authority in determining whether he can be compelled to produce the films.

Under such a scrutiny none of these defendants have the requisite control over the films to require that they produce them.

III.

THE EX PARTE INJUNCTION GRANTED TO PLAINTIFFS VIOLATES CODE § 55-102 WHICH PROHIBITS EQUITY FROM TAKING PART IN THE ADMINISTRATION OF THE CRIMINAL LAW AND THEREFORE THIS ACTION SHOULD BE DISMISSED.

The basis of the action alleged by the Plaintiffs is that the films are obscene under Ga. Code Section 26-2101 which makes it unlawful, *inter alia*, to possess obscene material of any description, knowing the obscene nature, thereof with the intent to distribute the materials. At bottom this complaint is aimed at enforcing the criminal statute quoted above by destroying that which makes it possible to commit the offense. This clearly is using equity to enforce the criminal laws and is prohibited under the Code section cite.

Equity will not enjoin a mere violation of the criminal law. *Moon v. Clark*, 192 Ga.47 (1941). Equity cannot be used to enforce the criminal law. *Bennett v. Kimmel*, 163 Ga. 725 (1926). It is clear that that is what is being done here as the Plaintiffs alleged that the films in question were being shown to public, which violates Ga. Code §26-2101. The complaints go further and say that Defendants "will continue to show said film for an indefinite period of time unless precluded by this Court from so doing." Plaintiffs' complaints, paragraph four. In the next paragraph of the complaints they allege further that "the exhibition of the motion picture film... constitutes a flagrant violation of Georgia Code Section 26-2101."

The Plaintiffs' actions in bringing these complaints were designed to stop the commission of what have been defined as crime by having the films destroyed. The Court should follow the cases cited and not allow its equitable powers to be used in contravention of Georgia Code Section 55-102.

Inasmuch as *Stanley v. Georgia*, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed.2d 542 (1969) allows for the private possession of obscene materials the films cannot be destroyed even if they are obscene as *Stanley* made it clear that it is not the materials but their use which is the concern of the criminal law. If mere private possession is protected by the First Amendment to the United States Constitution then the state of Georgia can only prosecute for violation of Ga. Code §26-2101. It cannot prohibit the possession of films when mere possession is not unlawful. To hold otherwise would negate the thrust of *Stanley*, See also, *Redrup v. New York*, 386 U.S. 767 (1967), rehearing denied 388 U.S. 924.

For the above reasons Defendants pray that their motions to dismiss be granted.

Respectively submitted,

D. FREEMAN HUTTON
ATTORNEY FOR MOVANTS

ROBERT EUGENE SMITH
ATTORNEY FOR MOVANTS

(Certificate of Service omitted in printing)

**IN THE SUPERIOR COURT FOR THE
COUNTY OF FULTON
STATE OF GEORGIA**

Civil Action No. B-61298

**LEWIS R. SLATON,
HINSON MCAULIFFE**

v.

**PARIS ADULT THEATRE I,
ROBERT MITCHEM, PHILLIP A. FISHMAN,
CLIFF TERRY, FRED PRITCHARD and JOE BALLEW**

Civil Action No. B-61299

**LEWIS R. SLATON,
HINSON MCAULIFFE**

v.

PARIS ADULT THEATRE II, et al

ORDER - Filed April 12 1971

The State contends that the motion pictures under review in the above actions are obscene. The titles of the films are "It All Comes Out in the End" and "Magic Mirror."

Assuming that obscenity is established by a finding that the actors cavorted about in the nude indiscriminately, then these films may fairly be considered obscene. Both films are clearly designed to entertain the spectator and perhaps, depending on the viewer, to appeal to his or her prurient interest. The portrayal of the sex act is undertaken; but the act itself is consistently only a simulated one if, indeed, the viewer can assume an act of intercourse or of fellatio is occurring from the machinations which are portrayed on the screen. Each of the films is childish, unimaginative, and altogether boring in its sameness.

It appears to the Court that the display of these films in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible.

IT IS THE JUDGMENT OF THIS COURT THAT the films, even though they display the human body and the human personality in a most degrading fashion, are not obscene.

The actions against the Defendants, therefore, are dismissed.

This 12th day of April, 1971.

JACK ETHERIDGE
JUDGE, Superior Court of
Fulton County, Atlanta
Judicial Circuit

**IN THE SUPERIOR COURT FOR THE
COUNTY OF FULTON
STATE OF GEORGIA**

No. B-61298

(Title omitted in printing)

No. B-61299

(Title omitted in printing)

STIPULATION OF THE RECORD -

Filed May 30, 1971

The motion picture films entitled "IT ALL COMES OUT IN THE END" and "MAGIC MIRROR" are a part of the record in and are to be considered on appeal of the above entitled cases.

The Supreme Court of Georgia consenting physical possession and custody of the said motion picture films shall be retained by the Solicitor General of the Criminal Court of Fulton County and shall at the direction of the Supreme Court of Georgia be made available for viewing by said Court.

W. BAER ENDICTOR

Assistant Solicitor General

Criminal Court of Fulton County

JUDGE

Superior Court of

Fulton County, Georgia

(Certificate of Service omitted in printing)

**IN THE SUPERIOR COURT FOR
THE COUNTY OF FULTON
STATE OF GEORGIA**

No. B-61298

(Title omitted in printing)

No. B-61299

(Title omitted in printing)

ORDER — Filed April 30, 1971

The motion picture films entitled "IT ALL COMES OUT IN THE END" and "MAGIC MIRROR" are hereby ordered to be delivered to and retained by the Solicitor General of the Criminal Court of Fulton County pending the appeal of the above styled cases, in order that the said motion picture films may be made available for showing to the Supreme Court of Georgia at its direction in compliance with the stipulation of record filed in said cases.

This 30 day of April, 1971.

**JUDGE, Superior Court of
Fulton County,
Atlanta Judicial Circuit.**

(Certificate of Service omitted in printing)

**IN THE SUPERIOR COURT FOR THE
COUNTY OF FULTON
STATE OF GEORGIA**

No. B-61298
**LEWIS R. SLATON,
HINSON MCAULIFFE**

v.

PARIS ADULT THEATRE I, et al.

No. B-61299
**LEWIS R. SLATON,
HINSON MCAULIFFE,**

v.

PARIS ADULT THEATRE II, et al.

**EXTENSION FOR TIME FOR FURNISHING TRANSCRIPT —
Filed May 12, 1971**

It appearing that Notice of Appeal has been filed in the above styled case and that the Reporter will be unable to complete the transcript within the time provided by law for transmittal of the record to the Supreme Court of Georgia.

It is HEREBY ORDERED that the time for furnishing the transcript and record be and it is hereby ordered extended for a period of 14 days.

This the 12 day of May, 1971.

**JUDGE,
Superior Court of
Fulton County, Georgia**

(Certificate of Service omitted in printing)

**IN THE SUPERIOR COURT FOR
THE COUNTY OF FULTON
STATE OF GEORGIA**

No. B-61299

**LEWIS R. SLATON
HINSON MCAULIFFE,**

v.

**CLIFF TERRY - FRED PRICHARD
PARRIS ADULT THEATRE II
JOE BALLEW, ROBERT MITCHEM
PHILLIP A. FISHMAN**

**COMPLAINT TO DECLARE MOTION PICTURE
ENTITLED "MAGIC MIRROR" OBSCENE
AND SUBJECT TO SEIZURE -**

(Filed Dec. 28, 1970)

Plaintiffs show that LEWIS R. SLATON is the District Attorney of the Atlanta Judicial Circuit, Atlanta, Fulton County, Georgia, and that HINSON MCAULIFFE, is the Solicitor General of the Criminal Court of Fulton County.

-1-

That the defendants do business as, own and operate Paris Adult Theatre II, 320 Peachtree St., N.E., Atlanta, Fulton County, Georgia, and exhibit for an admission fee certain motion picture films to members of the public.

-2-

That defendant Robert Mitchem is President of and defendant Phillip A. Fishman is the Manager of and operates and conducts the business of the Paris Adult Theatre II for the benefit of said corporation.

-3-

That the defendants are in joint control and possession of a certain motion picture film, entitled "MAGIC MIRROR" and is showing this film at the said theatre to the public on a fee basis.

-4-

That the defendants did on the 28th day of December, 1970, show said film to the general public and will continue to show the said film for an indefinite period of time unless precluded by this Court from so doing.

-5-

That the exhibition of the motion picture film entitled "MAGIC MIRROR" at the Paris Adult Theatre II, in Atlanta, Fulton County, Georgia, constitutes a flagrant violation of Georgia Code Section 26-2101 in that the sole and dominant theme of the said motion picture film considered as a whole and applying contemporary community standards appeals to the prurient interest in sex, nudity and excretion, and that the said motion picture film is utterly and absolutely without any redeeming social value whatsoever, and transgresses beyond the customary limits of candor in describing and discussing sexual matters.

-6-

Plaintiffs show that under the present interpretation of the law applied to such matters and adversary hearing to determine the question of obscenity must first be had prior to a seizure of such film and the destruction thereof.

WHEREFORE, Plaintiffs respectfully demand:

(a) That the defendants and each of them be served with a copy of this complaint as provided by law;

(b) That a Rule Nisi issue requiring the defendants and each of them to show cause on a date certain why the motion picture film "MAGIC MIRROR" should not be declared obscene and subject to be seized by the DISTRICT ATTORNEY of this Circuit or by the SOLICITOR GENERAL of the Criminal Court of Fulton County, and the defendants be directed to have and produce upon the said hearing the motion picture film "MAGIC MIRROR";

(c) That the motion picture film "MAGIC MIRROR" be declared obscene and subject to seizure;

(d) That the Defendants and each of them be temporarily and permanently enjoined from exhibiting the motion picture film "MAGIC MIRROR" within the jurisdiction of this Court.

(e) That the defendants and each of them be temporarily restrained and enjoined from destroying, altering, concealing or removing the motion picture film "MAGIC MIRROR" without the jurisdiction of this Court.

(f) That Plaintiffs have such other and further relief as this Court may deem mete and proper.

W. BAER ENDICTOR,
Assistant Solicitor
Criminal Court of Fulton County
Attorney for Plaintiffs

TONY HIGHT, Assistant District
Attorney, Atlanta Judicial Circuit
Attorney for Plaintiffs.

GEORGIA
FULTON COUNTY

Before me the undersigned attesting officer duly authorized to administer oaths personally appeared HINSON

MCAULIFFE, who, after being duly sworn deposes and says that the facts contained in the within and foregoing complaint are true and correct.

/s/ (Illegible)

Sworn to and Subscribed before me
this the 28 day of December, 1970.

James L. Webb

NOTARY PUBLIC

ORDER

The within and foregoing complaint read and considered, let the same be filed.

Let the Defendants and each of them show cause if any they have before the Presiding Judge of this Court on the 13 day of January, 1971, at 2:00 o'clock P.M., then and there to be heard why the prayers of the Plaintiffs' should not be granted and the motion picture film "MAGIC MIRROR" be declared obscene.

It is further ordered that the Defendants have and produce before the Court at that date and time aforesaid one print each of the motion picture film "MAGIC MIRROR" as it was exhibited to the general public on the 28th day of December, 1970, together with the proper equipment for exhibiting and viewing the same.

In the meantime and until further order of this Court, the defendants and each of them are temporarily restrained and enjoined from concealing, destroying, altering or removing the motion picture film "MAGIC MIRROR" without the jurisdiction of this Court.

Let the Sheriff of Fulton County serve a copy of the within and foregoing summons and complaint together with a

copy of this Order upon each of the defendants as provided by law.

Done this the 28th day of December, 1970, at 2:24 o'clock P.M.

/s/
JUDGE SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT

THE SUPERIOR COURT FOR THE COUNTY
OF FULTON' STATE OF GEORGIA

Civil Action, File Number: B-61299

LEWIS R. SLATON, DISTRICT ATTORNEY
HINSON MCAULIFFE, SOLICITOR GENERAL
VS.
PARIS ADULT THEATRE II, CLIFF TERRY,
JOE BALLEW, FRED PRITCHARD, ROBERT MITCHEM,
PHILLIP A. FISHMAN, 320 Peachtree, St., N.E.

SUMMONS

To the above-named Defendant:

You are hereby summoned and required to file with the clerk of said court and serve upon W. Baer Endictor, plaintiff's attorney, whose address is 160 Pryor St., an answer to the complaint which is herewith served upon you, within 30 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

This 28th Day of Dec. 1970.

/s/

Deputy Clerk

Filed in office, this the Dec. 28, 1970

R.L. Lawson, Deputy Clerk.

GEORGIA, FULTON COUNTY

I have this day served the Defendant JOE BALLEW personally with a copy of the within complaint and summons.

This Dec. 28, 1970 at 3:40 P.M.

Ch. Little, Investigator

Criminal Court, fulton County, Ga.

GEORGIA, FULTON COUNTY

I have this day served the Defendant Fred Pritchard personally with a copy of the within petition and process.

This Dec. 28, 1970

at 3 40 P.M.

C.R. Little, Investigator

Criminal Court, Fulton County, Ga.

GEORGIA, FULTON COUNTY

I have this day served the Defendant Cliff Terry personally with a copy of the within petition and process.

This Dec. 28, 1970.

C.R. Little, Investigator

Criminal, Court, Fulton County, Ga.

**IN THE SUPERIOR COURT FOR
THE COUNTY OF FULTON
STATE OF GEORGIA**

No. B-61299

**LEWIS R. SLATON
HINSON MCAULIFFE**

PARIS ADULT THEATRE II, et al.

ORDER — Filed Jan. 7, 1971

Due to a conflict in the Court's calendar, the time for appearance in the above styled case is hereby ordered changed from Wednesday, January 13, 1971, at 2:00 P.M. to Tuesday, January 12, 1971 at 2:00 P.M.

The Defendants and each of them are ordered to obey and comply with the rest and remainder of the original Order dated December 28, 1970.

/s/ (Illegible)

**JUDGE, SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT**

**IN THE SUPERIOR COURT FOR THE
COUNTY OF FULTON
STATE OF GEORGIA**

No. B-61299

(Title omitted in printing)

ORDER — Filed Jan. 8, 1971

Upon motion of the Defendants and Counsel for the Plaintiffs consenting the hearing in the above entitled case is

hereby ordered set for 10:00 A.M. on Wednesday, January 13, 1971.

This the 8 day of January, 1971.

/s/ (Illegible)

JUDGE, SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT

STATE OF GEORGIA,
COUNTY OF FULTON.

LEWIS R. SLATON, AS
DISTRICT ATTORNEY,
ATLANTA JUDICIAL CIRCUIT, AND
HINSON McAULIFFE, AS
SOLICITOR GENERAL OF THE
CRIMINAL COURT OF FULTON COUNTY,

Appellants,

v.

PARIS ADULT THEATRE I, ET AL.,

Appellees.

LEWIS R. SLATON, AS
DISTRICT ATTORNEY
ATLANTA JUDICIAL CIRCUIT, AND
HINSON McAULIFFE, AS
SOLICITOR GENERAL OF THE
CRIMINAL COURT OF FULTON COUNTY,

Appellants,

v.

PARIS ADULT THEATRE II, ET AL.,

Appellees.

I hereby certify that the foregoing pages, hereto attached, contain the original Notice of Appeal, filed in this office on

April 20, 1971, the Amendment to Notice of Appeal, filed in office on May 4, 1971, together with a true and correct copy of those portions of the record of file and required by the Notice of Appeal and Amendment to be transmitted to the Supreme Court of Georgia.

I further certify that under separate cover is transmitted to the Supreme Court of Georgia the Transcript of Proceedings, filed by the Court Reporter.

The Notice of Appeal, Amendment to Notice of Appeal, Transcript of Record, and the Transcript of Proceedings is the entire record on appeal, as appears from the records and files in this office.

I further certify that delay in transmission of this record from the date the Notice of Appeal was filed until May 28, 1971 was due to stress of work in this office, and in no way due to the fault of Appellant, nor any party at interest. On May 28, 1971, the deputy clerk in charge of collections in this office, mailed to Appellant's Attorney a bill for costs of filing Notice of Appeal, Amendment to Notice of Appeal, and preparing Transcript of Record, and filing of Transcript of Proceedings. Immediately upon payment the entire record on appeal is transmitted.

I further certify that an identical copy of the entire record transmitted is of file in this office.

Witness my signature and the seal
of Court, this 1 day of June, 1971.

Lora Paschal
Deputy Clerk, Superior Court,
Fulton County, Georgia.

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

No. C.A. B-61298

No. C.A. B-61299

**LEWIS R. SLATON, as
DISTRICT ATTORNEY, ATLANTA JUDICIAL
CIRCUIT, and HINSON MCAULIFFE, as
SOLICITOR GENERAL OF THE CRIMINAL
COURT OF FULTON COUNTY**

V.

**CLIFF TERRY, FRED PRITCHARD,
PARIS ADULT THEATRE I,
ROBERT MITCHEM, JOE BELLEW,
PHILLIP A. FISHMAN,
320 PEACHTREE STREET, N.E.,
ATLANTA, GEORGIA
PARIS ADULT THEATRE II.**

HEARING: JANUARY 13, 1971

BEFORE JUDGE JACK ETHERIDGE

TRANSCRIPT OF PROCEEDINGS

(T. 2) (The Court) All right.

(Mr. Smith) Your Honor, I have two expert witnesses which the defense will propose to call. I will ask, with the Court's permission, that they sit over in the jury box so they can view that. Your Honor, the Court has indicated that it wanted the films which were the subject of the show cause order produced in Court today. The defendants named and served are three, Joe Bellew, Manager of the theatre is here, and Mr. Bellew declines to produce on the basis that the production of the film in these proceedings could possibly lead to the eventual criminal proceedings and represent a deprivation of his rights under the fourth, fifth, and

fourteenth amendment to the Constitution of the United States, is that correct, Mr. Bellew?

(The Defendant) Yes.

(Mr. Smith) Your Honor, that is the position of Mr. Bellew, the defendant.

(The Court) Does Mr. Bellew refuse to deliver up the films?

(Mr. Smith) Yes, sir, he refused to deliver any film up, your Honor, on the basis of his right against self-incrimination.

(The Court) All right. The Court will compel him (T. 3) to and I must find him in contempt of Court for failure to produce the film.

(Mr. Smith) I will not produce the film, your Honor.

(The Court) All right.

(Mr. Smith) So the Court will enter—

(The Court) You can take an order, Mr. Moran, to that effect.

(Mr. Moran) All right. Should there be a fine imposed?

(The Court) I will impose a \$100.00 fine.

(Mr. Smith) Then, your Honor, we ask that the fine be suspended until such time as the matter can be disposed of.

(The Court) Indeed it shall be.

(Mr. Smith) Your Honor, at the time of our last hearing I indicated to the Court that as an officer of the Court I would see to the preservation of the film and without in any way waiving any rights the defendants have before this Court. I, as an officer of the Court, produced the film, delivered it to Mr. Moran wrapped in a big box with Christmas paper on it, and he enjoyed that.

(T. 4) (Mr. Moran) It's lousily wrapped I might say.

(The Court) Mr. Moran is grateful for all favors.

(Mr. Moran) The only criticism I have possession of it.

(Mr. Smith) Now that I have produced the film and the projector is in Court, I suppose this is the time when I bow down and let Mr. Moran proceed.

(The Court) All right.

(Mr. Smith) Maybe in the interest of saving time we would stipulate, maybe the second movie, although a different title, and different name, but similar in character to the first, so that by viewing the first — How do you feel about that, Mr. Moran?

(Mr. Moran) I would like to make such a stipulation but I believe the law forbids it because the law requires the Court emphatically and all persons to review it in its entirety.

(The Court) I could not find on one by stipulation, I think I have to make a finding of fact one way or the other.

(Mr. Smith) I was just trying to save time.

(The Court) I appreciate that very much. Let's proceed.

(Whereupon the film "It all comes out in the End", and "Magic Mirror" were then shown.)

IRA W. BROWN

(T. 5) DIRECT EXAMINATION

By Mr. Moran:

Q. Would you state your name and occupation to the Court, please? **A.** My name is Ira W. Brown, I am employed by the Solicitor's office of the Criminal Court of Fulton County as an investigator.

Q. I will ask you, Mr. Brown, if you had occasion to view the motion picture "It all comes out in the end"? **A.** I did.

Q. When did you first see it, sir? **A.** On December 28th of 1970.

Q. And where did you see it? **A.** At the Paris Adult Theatre, 320 Peachtree Street.

Q. And how did you gain admission to the theatre, sir? **A.** By paying an admittance of \$3.00.

Q. You bought a ticket for \$3.00? (T. 6) **A.** Yes, sir.

Q. And viewed the film? **A.** Yes, sir.

Q. Did you view the film on that day in its entirety? **A.** I did.

Q. I will ask you if you had occasion to see the same film as it was exhibited in this courtroom yesterday? **A.** I did.

Q. Was the film you exhibited in the courtroom yesterday the same film you saw at the Paris Art Theatre? **A.** To the best of my knowledge, yes.

Q. And was that located in Fulton County, Georgia, sir?

A. It was.

(Mr. Moran) The witness is with you.

CROSS EXAMINATION

Q. Mr. Brown, when you went to the theatre do you remember what the outside of the theatre looked like?

(Mr. Moran) Excuse me. May it please the Court, yesterday, at the suggestion of Mr. Smith, we went out and photographed the theatre, which we will submit in evidence (T. 7) and stipulate what the outside of the theatre is.

(Mr. Smith) All right. Your Honor, in view of the fact that Mr. Moran is willing, we are willing to stipulate, we will say that essentially the picture taken yesterday would have been the same as the outside of the theatre except for the title on December 28th.

(Mr. Moran) Yes, sir.

(The Court) All right.

Q. (Mr. Smith) You have seen the pictures, have you not, Mr. Brown? A. Yes, sir.

Q. And you are satisfied that those pictures when they are ultimately produced will be essentially the same? A. Yes, sir.

Q. As they were that day? A. Yes, sir.

Q. Were there any advertising pictures on the outside to draw your attention to the contents of either of the two films? A. No, sir.

(Mr. Smith) I have no further questions, your Honor.

(T. 8)

EXAMINATION

By The Court :

Q. Let me ask you this; do I understand from what you have said that as you approached and went to the theatre there was nothing to advise you that the film "It all comes out in the end" would be at that theatre? A. Yes, sir; I believe there was a sign out. I believe the attorney asked if there was any pictures, and I was assuming these were pictures of what was showing inside.

Q. But you knew the title of the film as you went in? A. Yes, sir.

Q. But there were no pictures to advertise it? A. No, sir.

(The Court) All right.

RE-EXAMINATION

By Mr. Moran:

Q. Was the title of the picture exhibited outside the door, outside the marquee of the building? A. I don't remember.

Q. Were there other people in the theatre when you were there, sir? A. Yes, sir.

(T. 9) Q. I will ask you, Mr. Brown, if there was anything exhibited on the outside of the theatre which would indicate to you that acts of fellatio or cunnilingual would be exhibited in that film? A. I don't remember it being, no, sir.

Q. Was there anything that would indicate to you that acts of intercourse in multiple groups would be shown to you in the film? A. No, sir.

(Mr. Moran) That is all.

RECROSS EXAMINATION

By Mr. Smith:

Q. And did you in fact see any film that showed an act of intercourse? A. The film I would say spoke for itself. When you see penetration, no.

Q. Did you see an act of cunnilingual activity as such? A. Simulated.

Q. Did you see an act of fellatio activity? A. —

Q. Let me ask you this. Have you seen any movies in the City of Atlanta where they were being shown in the (T. 10) theatre acts of cunnilingual activity and where fellatio is clearly depicted? A. Yes, sir.

Q. Were there any such depiction clearly depicted in this movie? A. Not clearly.

(Mr. Smith) No further questions.

REDIRECT EXAMINATION

By Mr. Moran:

Q. This is a film you saw yesterday, isn't it, Mr. Brown?
A. Yes, sir.

Q. I will ask you whether or not you witnessed one person, a human being with their head between the legs of a nude female? A. I did.

Q. On more than one occasion? A. Yes, sir.

Q. Did you see any films where there was a nude male between the legs of a nude female? A. I did.

Q. And with motions? A. Yes, sir.

Q. And did you see any film where the head and face of a nude female with her head in the pubic region of a nude male? A. I did.

(Mr. Moran) That is all.

RE-EXAMINATION

By The Court:

Q. Mr. Brown, I wonder if I could ask one other question, I want to be clear in my mind about it. A. Yes, sir.

Q. You have answered Mr. Moran's questions but I want to be sure of your having seen that. Would you state or could you state whether those acts were simulated acts or actual acts of cunnilingual activity and fellatio? A. You say were they acts?

Q. Did you observe those acts? A. Yes, sir.

Q. What impression— A. When you say did I observe those acts, I observed them as being those acts. I would say it was something that if you were in the room, you would see as much as you say on the film if you were standing in the room.

(T. 12) (The Court) All right.

RE-CROSS EXAMINATION

By Mr. Smith:

Q. Again you say you had seen films in Atlanta, being displayed at the theatres in which the acts are clearly depicted? A. Yes, sir.

Q. And you didn't see one act of penetration in this movie, did you, that you could clearly say was a penetration?

A. No, sir.

Q. And have you seen movies that depict penetration? A. Yes, sir.

Q. Is there then a difference between this movie and some other movies you have seen in Atlanta? A. No, sir.

Q. In terms of what they depict as to sexual activity? A. Well, that one did show penetration, whereas this didn't show penetration.

Q. You see a man's head between a woman's legs, would you have seen them from an angle that they were engaging in cunnilingual activity and not because you saw the cunnilingual activity, isn't that true? (T. 13) A. Yes, sir.

Q. So when you answered the Judge's questions, it was your imagination that you were utilizing as to what was being depicted on the screen, isn't that true? A. No, I wouldn't say that was my imagination.

Q. You saw the cunnilingual activity, you saw the fellatio or what you thought were those things? A. Well, I would say yes, that was what I believe it was.

Q. You say it was after seeing this movie that you would say that is what those things were? A. Yes, sir, definitely.

(Mr. Smith) That is all.

(The Court) All right.

(Whereupon the witness was excused.)

(T. 14)

C.R. LITTLE

DIRECT EXAMINATION

By Mr. Moran:

Q. Would you state your name and occupation to the Court, please? A. C.R. Little, investigator for the Solicitor's office of the Criminal Court of Fulton County.

Q. Mr. Little, I will ask you if you had occasion to see the motion picture entitled "Magic Mirror"? A. Yes, sir, I did.

Q. And when did you first see it, sir? A. On December 28, 1970.

Q. And where did you see it? A. Paris Art Theatre, at 320 Peachtree Street, N.E.

Q. Was that in Fulton County, Georgia? A. Yes, sir.

Q. Did you see the film "Magic Mirror" exhibited in this courtroom yesterday? A. Yes, sir, I did.

Q. Did you watch it in its entirety yesterday? A. Yes, sir.

Q. Did you see it in its entirety on December 28th, 1970? (T. 15) A. Yes, sir, I did.

Q. Was this the same movie that was shown in the courtroom yesterday that you witnessed on December 28th? A. Yes, sir.

Q. How did you gain admission to the theatre on December 28th, sir? A. By purchasing a ticket in the amount of \$3.00.

Q. And who did you purchase the ticket from, sir? A. I believe his name is Cliff Terry.

Q. I will ask you if Joe Bellew was there or have you ever seen him at the theatre? A. I have seen him there but he was not there at the time I purchased that ticket.

Q. And what position does Joe Bellew have with the theatre, sir, if you know? A. He told me he was the manager of the theatre.

Q. Joe Bellew told you that? A. And so did this boy Terry that I purchased the ticket from.

Q. Do you know what position Fred Pritchard has? A. Now Cliff Terry, the clerk on duty, told me that Fred Pritchard was the projectionist on duty at the time I witnessed this film.

(T. 16) Q. And it was Cliff Terry that sold you the ticket? A. Yes, sir.

Q. Were there other people in the theatre? A. Yes, sir.

Q. I will ask you if there was anything on the outside of the theatre that warned you what the contents of the film would be? A. Nothing other than the fact that it was adult movies being shown in the theatre.

Q. Was there anything there to warn you that acts of fellatio would be exhibited? A. Not in so many words, it was not listed on the windows there would be acts of fellatio or cunnilingual.

Q. Or erotica? A. No. It just referred to, the best of my memory, adult movies are being shown inside. Of course, it went on to state that no one under 21 years of age is admitted, and so forth.

Q. I will ask you if you had occasion to see a motion picture film entitled "It all comes out in the end" yesterday?

A. I did, sir. I saw that film in part, Mr. Moran, (T. 17) yesterday. I wasn't in the courtroom the entire time, really.

Q. I will ask you then if you have an opinion as to whether or not the motion picture film entitled "Magic Mirror" has any social redeeming value?

(Mr. Smith) Objection, your Honor, He has not been qualified as an expert. If he wants to make a proffer of him being an expert, he should do so after having qualified him.

(The Court) I believe that is correct, Mr. Moran.

(Mr. Moran) It would be out position, for the record, may it please the Court, that it is not a question for an expert; that the determination of the offensiveness of material such as this is the average man's test.

(Mr. Smith) Your Honor, as to the second test, no. The third test would relate to social value. There have been a variety of appeals in the Supreme Court of Memorabilia of all possible use considered and that the offensiveness aspect as the second test I think is somewhat different.

(Mr. Moran) The three member panel of the Missouri Supreme Court in upholding the conviction of one Herbert (T. 18) Paul Harstein asserted that obscenity is determined by how the average person views it. The question will be how it would affect this person himself.

Q. (Mr. Smith) Your Honor, that Missouri Supreme Court also said social value plays no part of any obscenity test which is, of course, in direct conflict with the Georgia Court and, of course, would be in direct conflict with the purpose for which this witness is now being asked the question.

(The Court) I sustain the objection.

(Mr. Moran) If the Court please, we now have the pictures which have been identified as Plaintiff's Exhibits 1, 2, and 3, that depict the outside exterior of the Paris 1 and 2 adult theatres. As the defendants in this case and as we stipulate, these pictures depict the theatre as the outside appeared to be on December 28, 1970.

(Mr. Smith) That is correct, your Honor, except for the title of the film.

(Mr. Moran) Yes, sir, with the exception of the title. He is with you, Mr. Smith.

(T. 19) **CROSS EXAMINATION**

By Mr. Smith:

Q. Mr. Little, Mr. Moran asked you if there were any signs outside that said acts of fellatio or acts of intercourse that were being depicted therein and I believe you said there were none. A. That's correct.

Q. Is there a theatre in town that does have such signs?
A. Yes, sir.

Q. Which one is that, sir? A. Flick 16 on Houston Street, in the City of Atlanta.

Q. So the Paris Adult Theatre has no such type of material outside? A. Not in those words.

Q. Have you been to that theatre? A. Yes, I have.

Q. Did you see acts of intercourse and did you see acts of fellatio? A. Yes, sir.

Q. Did you see acts of intercourse and did you see acts of fellatio clearly depicted in the movie "Magic Mirror"? A. I

saw acts of fellatio and cunnilingual and intercourse in the "Magic Mirror."

(T. 20) Q. You saw penetration? A. I didn't see the actual penetration of the penis, I have seen it in other films.

Q. Did you see a woman putting her mouth on the man's penis in this movie? A. I didn't actually see the lips touch.

Q. Did you see a man put his tongue on a woman's vagina? A. In the area of the vagina.

Q. So then it would be safe then to say it is your best recollection you saw no clearly defined acts of fellatio or cunnilingual or intercourse, is that correct? A. Coupled with the motions and the sound effects, the breathing, and so forth, I would say yes.

Q. This conveyed that impression to you, isn't that true? A. That's correct. I didn't see penetration, that is what I can say.

Q. You did see the woman's mouth on the man's penis but you didn't see the man's tongue on the woman's vagina, did you? A. I don't believe I actually saw the tongue on the (T. 21) vagina. It was in the region, the head was between the legs in the pelvic region.

Q. But you have seen movies where these things are clearly depicted? A. I have seen movies where these things are depicted.

Q. There was no question in this movie — A. There was no question in my mind.

Q. No question in your mind? A. No, sir.

Q. But in the other one this was clearly depicted photographically for you, true? A. That's correct.

Q. It was not clearly depicted photographically for you here frankly? A. There was no close-up actually showing the penetration as I have seen in other movies.

Q. You had to rely upon your visual senses, your hearing and such? A. I had to take it as a whole, the movement of the bodies, the region in which the head was or where the penis was or the vagina was with respect to the woman and the man. (T. 22) Of course, in one scene there was actual touching of the vagina as of two women, if you recall, in this picture.

Q. Yes. A. And the feeling and the fondling of the breasts and the body of one another, the movement, the heavy breathing.

Q. And from all those things, all those factors, that influenced you in arriving at your decision? A. I would say definitely there was intercourse, or fellatio or cunnilingual being performed, yes, sir.

Q. You didn't see it? A. I didn't see the penetration.

Q. You didn't see the act actually being performed but you saw— A. I would say in my mind, what I conceived in my mind from watching this picture, the movement, the position of the bodies, the penis being in the region it was in with respect to the woman, there was no question but what intercourse was being had, cunnilingual was being performed or fellatio.

Q. You didn't actually see it clearly and photographically depicted, did you? (T. 23) A. I didn't see the penetration as I have seen in other pictures.

Q. All right. Have you ever seen an Indian being shot off a horse by an arrow in a movie?

(Mr. Moran) Your Honor, that has no relevancy to this hearing whatsoever.

(Mr. Smith) I think it would have relevancy.

(The Court) I don't know, he is entitled on cross examination—

(Mr. Moran) Unless, of course, the Indian was nude.

(The Court) If he was an Eskimo, would it make any difference?

(The Witness) I suppose I have, sir, at one time or another, I have seen Western movies.

Q. (Mr. Smith) Do you know as a matter of worldly wisdom that Indian didn't really get shot by an arrow and didn't get killed, don't you? A. I don't profess to be a man of worldly wisdom. I don't think he got shot by the arrow, no, sir.

Q. All right. That was simulated death, wasn't it? A. Well, I suppose it was, yes, sir.

Q. And he grunted and groaned and acted like he was (T. 24) dying, didn't he? A. Well, they go through the motions, yes, sir.

(Mr. Smith) No other questions.

REDIRECT EXAMINATION

By Mr. Moran:

Q. Was there any doubt in your mind when you saw or when you testified you saw the naked man with his head between the legs of a naked man with his head between the

legs of a naked woman and his face in the pubic area that an act of cunnilingual was being performed, was there any doubt in your mind about that? A. No, sir.

Q. If you should walk into a room and see a nude woman with her legs spread apart and a nude man on top of her going up and down and her moaning and groaning and making upward and downward movements with her head and him making remarks for her to take it all, would you say that was an act of fellatio? A. Yes, sir.

(The Court) Anything further, Mr. Smith?

(Mr. Smith) No, sir.

(Whereupon the witness was excused.)

(Mr. Moran) The plaintiff will rest at this point, (T. 25) subject to the right of rebuttal.

(The Court) All right.

(Mr. Smith) May it please the Court, we come to that point of the presentation of the case by the Solicitor where we move to dismiss.

(Whereupon argument follows.)

(The Court) Gentlemen, I greatly appreciate your presentation of this case but I need to carefully and thoughtfully read a number of cases and study your briefs.

(Mr. Moran) Would the Court retain possession of the films?

(The Court) Yes, sir.

(Mr. Smith) Your Honor, technically I think for the record let's say the defendants or the parties at interest asked

the Court to hold the films in administrative custody.

(The Court) Yes, I am adjusting this hearing for that purpose, of course, of retaining this evidence, and to go ahead and rule now I don't think we can be fair in this case.

(Mr. Smith) Your Honor, we have a witness who has been sitting here and has seen the movie, and while the Court can certainly defer its ruling on our motion to dismiss (T. 26) at this point, I would ask leave and let this witness testify, and I would also like to have the Court have available certain films of the case involving a short 10 minute 16 millimeter film, I have an 8 millimeter film which I will proffer to the Court, it was in the Massachusetts Supreme Court case involving one of the same girls who appeared in "It all comes out in the end" to simulated sexual activity, I have not shown either of those two to the prosecution here, and I would like to give it to them and have them view it at their earliest convenience and then perhaps thereafter I can proffer it to the Court.

(The Court) Is that for the purpose of comparison in these?

(Mr. Smith) This is to illustrate the decisions.

(The Court) They were held not to be obscene?

(Mr. Smith) Yes, sir. They are merely to illustrate those decisions, your Honor, because it is difficult when you take the word of a Judge and try to say—

(The Court) Surely.

(Mr. Smith) I would like to show it to my brother and then thereafter they can deliver it to the Court only as illustrations and not as evidence in this case.

(T. 27) (The Court) I understand that. Of course, I welcome anything that either or both of you think is helpful

in reaching the question. Mr. Moran, what about that, do you feel that would be helpful to you?

(Mr. Moran) I haven't seen it, and I can't say whether it's a comparative film or not, I do not know, sir.

(Mr. Smith) It's illustrative of the decision, your Honor, I'm not saying that it is a comparison.

(The Court) I understand that. You want to illustrate the opinion that would be studied.

(Mr. Smith) And thereafter Mr. Moran can make whatever objections he wishes.

(The Court) Whatever you two do is fine. Now we have a witness here, what are your feelings about having his testimony offered at this time?

(Mr. Moran) I have no objection to it, sir.

(Mr. Smith) Would you waive any rights, your Honor?

(The Court) Yes, sir, by all means.

(T. 28) **ROBERT MORRIS DOWD**

DIRECT EXAMINATION

By Mr. Smith:

Q. Please state your full name and address and present professional affiliations to the Court. A. My name is Robert Morris Dowd, my present address is 6061 Parish Avenue, New Orleans, Louisiana; I am presently Assistant Professor of Maternity and Child Health and Family Health and Population Dynamics at the School of Public Health and Tropical Medicine at Tulane University.

Q. Now in addition do you hold a special appointment somewhere? A. Yes, sir, a great many of them.

Q. Are you appointed by the Governor to any committees? A. Yes, sir. Would you like for me to give them to you?

Q. Yes, please, tell us generally what your background is. A. In general committees, I am currently a member of the Louisiana Mental Health Planning Council, in fact, I am the Vice President of it; I am currently a member of the (T. 29) Louisiana Mental Health Association, the Committee on Mental Health Centers, I am a member of the Louisiana Psychiatric Association and up until just recently I was a member of the Juvenile Delinquency Committee of the Louisiana State Crime Commission or the Commission on Law Enforcement and administration of Criminal Justice; my committee was just recently disbanded and I have received a citation from the Governor for outstanding service to the State of Louisiana dealing with these kind of problems.

Q. Have you had any particular employment as a professional consultant for Orleans's Parish with respect to sex education? A. Yes, sir. During the past three years in Louisiana I have served as Director of Family Life and Sex Education of Orleans's Parish in the public school system, I have also served as an adjunct to the Assistant Professor of Maternity and Child Health and a clinical assistant professor of Psychiatry and Neurology.

(The Court) Are you a medical doctor?

(The Witness) No, sir.

(The Court) You are not a psychiatrist?

(The Witness) Would you like my educational background?

(T. 30) (The Court) Yes.

(Mr. Smith) I was going to ask him that next question.

Q. (Mr. Smith) Tell us what degrees and what educational institutions or universities you have attended and the degrees you hold. A. Yes, sir. I have a Bachelor of Arts degree in Philosophy from the University of Buffalo, I have a Master of Education degree from the University of Buffalo and I have a Master of Arts degree from the State University of New York at Buffalo, which is the same university but a new name, I have a doctorate in education degree from the State University of New York at Buffalo and I have a Master of Public Health degree in family health and population dynamics from Tulane University School of Public Health and Tropical Medicine.

Q. As a member of the Louisiana Psychiatric Association, are you then permitted to counsel with patients? A. Yes. Up until July 1st I was a full time member of Dr. Robert East's group practice in psychiatry in Tulane University, in the Department of Psychiatry, and as a member of that group practice I did mainly marital therapy and I also taught human sexuality and marital therapy to the (T. 31) medical students and psychiatric residents.

Q. In connection with those duties, sir, did you have occasion to deal with people regarding their reactions to matters depicting nudity and such? A. Yes, sir, I did.

Q. Is this in your professional work? A. Yes, and I still do.

Q. In what context, would you please tell us? A. Well, currently I am in the family planning unit of Tulane University and I am looking at the psychiatric aspects of family planning, but a great many of these aspects deal with

human sexuality, I have also maintained a marital therapy practice and take a limited number of patients referred to me by either psychiatrists or by obstetricians in the New Orleans area.

Q. And when you say you had medical education, you were teaching medical students on this aspect of it? A. Yes, sir.

Q. What was your relationship in that regard, sir? A. Well, this was a course instituted approximately five years ago for medical students at Tulane and is one of approximately five of these types of courses around the country. And we really felt that both medical students and (T. 32) also graduate students in school of education, school of social work on the main campus of Tulane needed to know more about human sexuality.

Q. What was the purpose behind that thesis? A. That they were not well equipped to deal with problems in the community.

Q. Now, Doctor, did you have occasion to or have you in connection with your work in this regard done any studies or have you had periodical data upon which you traditionally rely in the state of your practice and profession? A. Yes, I have.

Q. Have you been able to make certain observations regarding the reaction of people to prurient display of nudity or sex? A. A great many of them.

Q. Have your observations been either the same as or comparable to the conclusions that you read regarding periodical studies which you traditionally rely upon in the pursuit of your profession? A. Yes.

(The Court) That is a pretty broad question.

(Mr. Smith) Well, it is difficult to—

(T. 33) (The Court) I don't know how that compares to what other studies are, and so forth.

(Mr. Smith) Your Honor, I merely wanted to show the witness' familiarity with some material—

(The Court) Familiar with the general writings in his field I suppose that's what you're really asking?

(Mr. Smith) Yes, your Honor.

(The Court) All right. I assume they are not unanimous in their same views, so we can't agree with all of them.

(Mr. Smith) No, sir. But I would then offer the Doctor, your Honor, as a witness to testify regarding the prurient appeal aspect as well as the social value aspect traditionally.

(The Court) All right.

Q. (Mr. Smith) Doctor, you have viewed either in the courtroom or at facilities made available to you the two movies that were displayed entitled something about "It all comes out in the end" and "Magic Mirror", is that correct? A. Yes, sir.

Q. And do you have an opinion, sir, as to whether those two movies would appeal to the average adult person's prurient interest in sex, that is to say, the sick or morbid (T. 34) in sex, do you have an opinion? A. You are asking me if it would appeal to a sick or morbid person?

Q. Do you have an opinion as to whether it would appeal to a sick or morbid person? A. Yes, I do.

Q. What is your opinion, Doctor? A. If I understand the question properly, you are asking me, it seems as though

contained within your question you are asking me if the average person is morbid or sick, could you repeat that again?

Q. No. I say does the movie, do you have an opinion as to whether the two movies you have seendisplayed have an appeal to the average adult's prurient interest in sex? A. No, sir.

Q. Prurient is defined as sick or morbid interest in sex. A. I do have an opinion. My opinion is that it would not.

Q. And why do you say it would not, sir? What interest in sex would it appeal to? A. I just simply don't believe that the average normal American adult has a prurient in sex. I think that if the average American adult walked into one of these (T. 35) theatres and sees a movie such as this, that he is exhibiting a normal healthy sexual interest rather than a prurient or morbid or sick interest.

Q. Doctor, after viewing these movies do you have an opinion as to whether these movies, consider all possible uses, consider they are in a public theatre, the type that has been described and testified to, would have any values to society? A. Yes, sir.

Q. And what is your opinion? A. Well, I have several opinions about that.

Q. Well, please state them. A. I feel that many normal healthy American adults have a great many fears about their own sexuality, they have a great curiosity about other forms of sexuality perhaps and they in general consider the question, am I normal, they are always asking themselves am I normal. Now I am not basing this on expert sophisticated opinions of my own but rather those feelings I have derived from a great many patients and also from a vast sample of persons here in the south that I have surveyed. These people

are healthy and curious about sexual activity and they do have fears about their own human sexuality, and to go to a movie this (T. 36) I would feel would help to eliminate some of those fears. For instance, if we are referring to the movies that we saw yesterday—

Q. Those two movies, yes, sir. A. It seems to me the person might have some, let's say, a person who was normal and healthy, he has some fears back there somewhere that he might be a homosexual and he might go into a movie such as this and see that depiction of the homosexual and say my God, I am not like that, I don't want to be like that, and so forth, or he might say, my God, I'm like that and go seek help. So the movie might get him to come to a professional and to seek help. Also women have fears about their breasts being a normal size or abnormal size, do they have more pubic hair or less than others, and so do males. Of course, the last movie wouldn't have helped any.

(The Court) I was going to say—

(The Witness) Well, I am talking about these kind of movies in general. I think this kind of thing helps to eliminate fears, it helps to satisfy curiosity about sexual matters. I am well read in the literature and being so I can quote probably in the Presidential Commission that (T. 37) approximately 84 percent of all men and 69 percent of all women in the country have exposed themselves voluntarily to this kind of material, and I can't pronounce this man's name correctly—

Q. Anashia— A. Anashia, I think that's right, he is from Johns Hopkins, he found a little bit higher figure, I think it was 92 percent males and 70 percent of the females, and there's another study, I can't recall the man's name, but which is found on page 119 of the report, that describes the survey of several hundred middle class men and women, that 84 percent of these reported they had voluntarily taken a look at these kind of depictions, and I'm seeing more and

more of the couples going to these theatres, married couples, and so forth. I think personally these movies appeal to the normal American adult, and I don't think it is a prurient interest, I think it is a healthy interest in sex.

(Mr. Smith) No further questions.

(T. 38) CROSS EXAMINATION

By Mr. Moran:

Q. Is it your opinion, sir, that the movie that you saw yesterday depicted normal sexual activity? A. I think that normal sexual activity from what we know from all studies in this country and from the Kinsey Report and from every other kind of report we have in this field that normal sexual activity encompasses a wide range of activities and I didn't see any activities in the movies that was beyond the normal range of human sexual activity.

Q. As you view it, is that right, sir? A. Do you mean as I view the movie or as I view normal human sexual activity?

Q. Yes, sir, normal sexual activity. A. As I know it to be from dealing in this area with a great many patients and with a great many people at large.

Q. All right, sir. Then your opinion primarily is based on information gathered from people that you have treated or come in contact with in your profession? A. No, sir. The greatest part of my information comes from surveys of citizens of the Southern community and from observations made rather than from the patients. The patients would constitute perhaps a third of that kind (T. 39) of information.

Q. And your surveys were made by other people, is that correct? A. No, sir. The surveys were made by myself.

Q. You made surveys throughout the south on sexual activities? A. On sexual attitudes.

Q. Sexual attitudes? A. The parents' feelings about what kind of things children should learn, and this kind of thing, yes, sir.

Q. Have you conducted such a survey in the metropolitan Atlanta area, sir? A. No, sir.

Q. All right. A. The best I have done in that respect was to sit down approximately two years ago with your people on Peachtree in the educational television department and speak with them about the need for this kind of educational material here in Atlanta.

Q. Doctor, have you seen "Magic Mirror" before yesterday, sir? A. No, I hadn't.

(T. 40) Q. Then you didn't see all of that film, did you? A. No, sir, I haven't.

Q. You saw only half of it? A. Right.

Q. Did you see "It all comes out in the end" prior to yesterday, sir? A. No, sir, I haven't.

Q. Now when were you employed or retained to come to Atlanta to testify in this matter, sir? A. I believe the day before yesterday I came here. I would say yesterday or the day before that.

Q. Actually, you came to testify in relation to these two films that you had never seen before, isn't that correct, sir? A. I came to look at the films and give an opinion, yes, sir.

Q. Now have you testified in cases such as this in the past, sir? A. No, sir, I have never testified in a case involving a film.

Q. Have you testified in cases involving obscenity? A. Yes, sir, I have in two cases.

(T. 41) Q. Where were those two cases? A. One in Federal Court in New Orleans and the other was in Memphis. The one in New Orleans is still unresolved and the one in Memphis, the material I have viewed was found to be not obscene.

Q. Who retained you in those two cases, sir, which counsel was involved? A. Mr. Smith retained me for the Memphis case and Mr. Jack Peebles in New Orleans.

Q. You were retained or paid to come to Atlanta to testify, is that correct? A. Yes, sir.

Q. There seems to be, and you correct me if I am wrong, an inference from your testimony that sex films could have a therapeutic value, is that your attitude, sir? A. I am not going to make this like a doctor-patient value but rather a therapeutic value for the community at large, yes, sir.

Q. The entire community at large? A. Or that portion of the community that would like to see this kind of material or has curiosity about this (T. 42) kind of material.

Q. Do you think, sir, in your opinion that such a film would stimulate an interest or curiosity in sex? A. I would hope that the normal healthy American male or female would be sexually stimulated by sexual material. And unfortunately I believe these two films here were sort of a spoof on sex, the "Magic Mirror" was almost an anti-sex movie.

Q. It would be more anti-sex than it would be therapeutic, wouldn't it? A. It certainly was far from what I call unsexual material, unsexual material as I am accustomed to talking about in these kind of movies.

Q: That material would not then reflect in the films that you saw yesterday, would they, as you define sexual material?

A: The sexual movie as I say to me was a spoof on sex rather than being hard sex.

Q: And for what purpose was the sex film made, sir? A: Personally I would get some amusement out of a film like that at the beginning, and I think complete boredom by the time I had gotten to the end of that first reel. The only value I can see in this kind of film would be perhaps some educational value for persons who are curious (T. 43) about this kind of thing and perhaps some amusement value.

Q: Then it would appeal to persons who had curiosity, for example, about lesbianism? A: I think a great many American males have curiosity about lesbianism and this might help to resolve some of their curiosity.

Q: Then would you say that a scene such as the television repair man and the young lady, where they covered each other with some substance, either shaving cream or whipped cream or something that had a therapeutic value, would resolve some normal person's question as to what sex would be like covered with shaving cream or whipping cream? A: Well, I would like to respond to you in saying that in matters of fact, you know, there is no forte, just fact, nothing was happening there except the man's penis was in a limp stage and there was no real sexual activity going on, it was sort of like a wrestling match, and in the second set of scenes it was something like a modern dance troupe, but it certainly wasn't sexual activity.

Q: I will ask you then, Doctor, basically a hypothetical question. Should you walk into a bedroom in your house or anyone else's house and you saw a nude female covered with shaving cream or whatever the substance was and a nude male who had so adorned himself on top of her nude, (T. 44) between her legs, going up and down, she moving and

groaning, would you then suggest that this was wrestling match as opposed to intercourse? A. Since this is a hypothetical question I cannot answer instantaneously until I had further evidence.

Q. Then you would walk over and get down on one knee and say if there is penetration I'll blow your brains out, if there is not I will forgive you for simulating it?

(The Court) I don't understand that question.

(The Witness) You've lost me there.

Q. (Mr. Moran) What I have reference to, for example, you walked in and found your daughter, if you have a daughter, hypothetically in bed nude with a man on top of her who was also nude between her legs, going up and down, she moaning and groaning and saying how good it was, when you in your professional capacity evaluating the average person, would stand there and toss over in your mind whether this is a simulated act or not? A. Well, referring to my daughter, I could only say that she should not be in bed with anyone naked and I draw my conclusions right there. But if you are asking me about the movie and about the simulated sexual act, I am personally familiar enough with these kind of movies to know that when (T. 45) they do have these sexual acts in the movies, when it is factual rather than imagined, that these camera men who make these movies very often take a picture of the scrotum sac, if there is ejaculation will tend to shrink, and they will do several other things that will demonstrate that there actually is sexual activity taking place. I did not say I went to medical school but I had long enough to take anatomy and a few other things, and I happen to know that intercourse in at least a great portion of those movies was impossible; that when a man was positioned by the woman with her legs spread apart, that it was just simply impossible that intercourse was taking place.

Q. Doctor, have you had a chance to observe some of the latest works of allegedly medical texts showing intercourse in 98 different positions? A. I certainly have.

Q. They are the same depiction? A. When the actual intercourse is shown the male has a rigid or erect penis. But the males in these films had very limp penises, especially in that first movie. And other than that I did not observe any sexual activity in these films.

(T. 46) Q. Sexual activity in your judgment would have to either have, one, an erect penis, or two, a wordly view of the insertion in your judgment for intercourse to be taking place, before you would determine it was sexual intercourse, is that right? A. Yes, sir.

Q. All right. What moralistic or educational value would the scene that you just described have on the average person, that is, a close-up shot of the scrotum expanding or contracting during ejaculation, do you think this is a great phenomena that everyone should be familiar with? A. I am struck by the vast interest by the average person in the reproductive anatomy and physiology because to me it really isn't that appealing. But when Masters and Johnson came out with their first book it was simply a book filled with all kinds of physiological comments about what happens during various aspects of intercourse and/or examples, it was the best seller. Now apparently there are a vast number of people who will find this interesting reading. I personally did not.

Q. For curious people, isn't that right? (T. 47) A. For curious people.

Q. You don't consider yourself, sir, an average person educationally speaking, do you? A. No, although I consider myself very much with the contemporary community standards because I do participate in a great many areas of the community and get to know people from all walks of life.

Q. And basically your associations are with persons in the medical profession or either patients, isn't that correct? A. And Colleagues because I am a professor, right.

Q. Now can you honestly state, sir, that the orgy scenes that were shown yesterday in these two films would contribute to the welfare of this community? A. I think it depends on your moral judgments about some other things. For instance, if a couple was curious about wife swapping or something like this and they could substitute some fantasy by seeing a film such as this rather than the actual thing, I think this might be good for the community.

Q. Would you consider a couple, sir, who was considering wife swapping, a normal average couple? A. You didn't ask me about normal average. You said (T. 48) would it be good for the community, and as far as I am concerned to say one's soul is good for the community.

Q. But would you consider a person who was considering wife swapping a normal average person? A. No, sir.

Q. Then to satisfy this person would be an abnormal person with abnormal desires, isn't that correct, sir? A. I'm not sure. It might possibly be abnormal, yes, sir.

Q. All right. Now let's take the converse, Mr. Witness, if we may. Isn't it possible that such a scene could encourage someone who had not considered wife swapping to experiment in this field? A. No, I don't believe so.

Q. You don't think that? A. No, I don't because I think that in all of these sexual movies that if you see these things I think they serve more as a fantasy substitute than they do to encourage activity. We also know that the life of the action of these movies and books is around four hours, that they don't stimulate much beyond four hours.

Q. If they did extend even to four hours, the male (T. 49) would lose characteristics that you insist are essential elements in participating of the sex act? A. I am talking about psychological stimulation, right.

Q. I believe you testified that these films were a spoof I think is the word you used. A. The second film was essentially I felt sort of a comedy, you know.

Q. To you it was a humorous film as opposed to a serious sex work? A. Yes, sir. In other words, I am familiar with sexual films around the country, so-called hard core films, and this film just simply doesn't meet the standard as far as I am concerned.

Q. In your opinion were these pictures made and produced for educational purposes or were they made and produced to exhibit to the public?

(Mr. Smith) Objection, Your Honor. There is no element of any tests.

(Mr. Moran) I was just asking him on cross-examination.

(The Court) I will let him answer for whatever it is worth.

(T. 50) (The Witness) I feel that the answer has been given already in the sense of the mentioning of encyclopedias or any overpriced anything. Certainly these films are developed and I feel they are developed simply because your major film producers want it this way; in other words, I don't feel the people that made these films started this, I think the Hollywood producers started this.

Q. For what purpose would you say they produced these films, for educational purposes or medical purposes or therapeutic purposes or appeal to the public interest in sex? A. For entertainment, to try to draw in a crowd, to fill the theatre up.

Q. Do you consider this entertainment, sir, two lesbians on the bed making love to one another? A. They are paying \$5.00 or \$3.00 for something.

Q. Would you consider entertainment a nude female in the act of fellatio upon a male whether simulated or actual penetration shown, would that be entertainment, sir? A. Looking at this kind of material has provided entertainment for a great many hundreds of years in one form or another.

Q. Do you presume by the number of people who buy (T. 51) admission to theatres that it is entertaining to each of these people or would you presume some are there because of a morbid curiosity in sex? A. I would like to answer that without offending anyone. But I think the person who goes into this kind of movie, who goes in offensively to the movie, in other words, who is there to make trouble rather than to be entertained, I think this is morbid.

Q. Then if the person was not entertained by either the films that you saw yesterday, you would say that he was an inoffensive person seeking to cause trouble? A. No, sir.

Q. They have to be entertained by these people or they are not normal? A. No, sir. I told you that I was bored by this film after awhile.

Q. This film didn't contribute anything to your welfare, did it? A. No, sir, and it didn't stimulate me either as far as that goes.

Q. I will ask you, Mr. Witness, if on yesterday, if you had not presumed it to be offensive to this Court, that you would have walked out of this film and stayed outside (T. 52) the hall until it was shown?

(Mr. Smith) Are you presuming if he had not been intended to be a witness?

(Mr. Moran) Yes.

(The Witness) I can answer that very simply; that you have already pointed out, that I am here as an expert witness and paid to do a job, and I certainly would sit through the film and watch it.

Q. (Mr. Moran) Would you pay \$3.00 to see either one of these films? A. No, sir.

Q. \$2.95? A. No, sir.

(Mr. Moran) That is all.

REDIRECT EXAMINATION

By Mr. Smith:

Q. Doctor, just to clear up a point, when did I first call you about testifying here in this case? A. I am trying to remember—

(The Court) Is that significant?

(The Witness) Monday morning or something.

(Mr. Smith) I would like to just—

(The Witness) I think you woke me up Monday morning.

(T. 53) (Mr. Smith) Did I advise you what I understood the films contained? A. Yes, sir, you did.

Q. What did I ask you with reference to that and you remember calling me back later? A. I think you asked me

later to think about it and if I had any thoughts about this kind of material, and I am sure you asked me with the knowledge that I had been obtaining on some of these films to get some ideas about them.

Q. All right. And when you came here it was understood that you would not testify if you had a different opinion, the films were other than as I described? A. I think this is well understood, right.

(Mr. Smith) No further questions.

EXAMINATION

By the Court:

Q. I want to ask the Doctor a few questions if I may, at the risk of being misunderstood. I am very curious about one thing. You might or might not have a view about it, I don't think this has anything to do with any ruling I should make, but at the end of the film that we saw yesterday called "Magic Mirror" there was a scene where a (T. 54) young man was shot by a police officer and there was this dramatic gushing of blood and he is killed, there was no emotion shown on the part of the girl as to the death and all the rest of the rather blase approach towards it, what relationship does that have, what does that do to, if you have an opinion, viewer, does that exacerbate sex feelings or what, what does it do? A. By violence, not only in any film, but as far as I am concerned they don't need to do that kind of thing, but at the same time what I am so taken back by is that this is a film apparently being shown in an adult theatre restricted to persons who want to pay their \$3.00, in other words, they choose to go there, and we choose to do a lot of things in life and then we either get taken or we don't. What I really object to, a few weeks ago, four weeks ago or so there was a Life Magazine that comes into my home, that comes into most everyone's home, showing heads lopped off or who had

committed Hari Kari, just grizzly, ghastly things that to me are obscene and should not be permitted to intrude in my home, and this I don't approve of even in these movies or in Life Magazine or anywhere else. Apparently our society is filled with this and it does intrude on us.

Q. Well, this clearly, the violent cause of death and (T. 55) the sight of death concept which is said to be filled with all sorts of psychiatric means thrust into this, but this movie, would you perceive that to be for the purpose of making or arousing greater reaction on the part of the viewer? A. I can't imagine that it would and therefore I can't imagine why they put it in. This seems to be true of a lot of these sexually oriented magazines and things that they do, or books, the printed books, they will have a death at the end and I don't really know why. I have never met any patients who were abnormal that were attracted by this kind of thing, so I don't know who they are trying to attract.

(The Court) Thank you very much, Doctor. Are there any other questions?

(Mr. Smith) No.

(Mr. Moran) No further questions.

(The Court) Gentlemen, you will hear from me sometime during the next week or so.

(Mr. Smith) Your Honor, technically I then renew my motion to dismiss. I don't know whether the prosecution would have any rebuttal testimony.

(Mr. Moran) No, sir.

(The Court) Thank you, gentlemen.

Plaintiff's Exhibits 1



Plaintiffs' Exhibit 2

The foregoing transcript of the proceedings, together with the exhibits, is true and correct and filed as the record in the above stated case.

This 11th day of May, 1971

RED BUSHNELL

State Superior Court

State Superior Court



PARIS ADULT THEATRE, ST. LOUIS

Plaintiffs' Exhibit 3



GEORGIA, FULTON COUNTY.

The foregoing transcript of the proceedings, consisting of pages 1 through 56, together with the attached exhibits, is true and correct and filed as the record in the above stated case.

This 11th day of May, 1971.

FRED BURRELI

Fulton Superior Court

Atlanta Judicial Circuit.

Filed for Record 25 day of May, 1971

Recorded May 26, 1971

**STATE OF GEORGIA,
COUNTY OF FULTON**

LEWIS R. SLATON, AS DISTRICT

ATTORNEY, ATLANTA

JUDICIAL CIRCUIT, AND

HINSON McAULIFFE, AS

SOLICITOR GENERAL OF THE

CRIMINAL COURT OF FULTON COUNTY,

APPELLANTS,

V.

PARIS ADULT THEATRE I, ET AL.,

Appellees.

D. FREEMAN BUTON

Attorney for Appellants

(Delivered in the Court Room)

LEWIS R. SLATON AS DISTRICT ATTORNEY,
ATLANTA JUDICIAL CIRCUIT, AND
HINSON McAULIFFE, AS
SOLICITOR GENERAL OF THE
CRIMINAL COURT OF FULTON COUNTY,
APPELLANTS,

V.

PARIS ADULT THEATRE II, ET AL.,
APPELLEES.

I hereby certify that the foregoing pages, hereto attached, contain the original Transcript of Proceedings, filed by the Court Reporter on May 25, 1971, in the above stated cases.

I further certify that the Court Reporter filed an identical copy, which is of file in this office.

I further certify that under separate cover is transmitted to the Supreme Court of Georgia the Notice of Appeal, Amendment to Notice of Appeal and the Transcript of Record, as required to be transmitted. The foregoing, together with the Transcript of Proceedings, filed by the Court Reporter, is the entire record on appeal, as appears from the records of file in this office.

Witness my signature and the seal of Court, this 1 day of June, 1971.

Lora Paschal
Deputy Clerk, Superior Court
Fulton County, Georgia.

**IN THE SUPREME COURT OF THE
STATE OF GEORGIA**

Case No. 26631

LEWIS R. SLATON,
As District Attorney, et al
Appellants,

v.

PARIS ADULT THEATRE I, et al
Appellees.

STIPULATION OF RECORD

It is hereby stipulated that the cases of LEWIS R. SLATON, et al, v. PARIS ADULT THEATRE I, et al, Fulton Superior Court Case No. B-61298, and LEWIS R. SLATON, et al, v. PARIS ADULT THEATRE II, et al, Fulton Superior Court Case No. B-61299, were tried jointly in the Superior Court of Fulton County and that counsel for each and all of the parties stipulated and agreed to waive a trial by jury and a preliminary hearing in order that the judgment and order entered by the trial judge would be a final order and judgment in the said cases.

THOMAS E. MORAN

W. BAER ENDICTOR
Attorneys for Appellants
(Plaintiffs in the Trial Court)

ROBERT E. SMITH

D. FREEMAN HUTTON
Attorneys for Appellees.
(Defendants in the Trial Court)

**IN THE SUPREME COURT
OF THE STATE OF GEORGIA**

Case No. 26631

LEWIS R. SLATON,
As District Attorney, et al
Appellants,

v.

PARIS ADULT THEATRE, I, et al,
Appellees.

ENUMERATION OF ERRORS

SLATON, et al, vs. PARIS ADULT THEATRE I, et al:

1. The Court erred in finding and declaring the 16mm motion picture film entitled "IT ALL COMES OUT IN THE END" not obscene.
2. The Court erred in refusing to enjoin the Defendants from exhibiting the said motion picture film entitled "IT ALL COMES OUT IN THE END."
3. The Court erred in dismissing Appellants complaint against the Defendants.

SLATON, et al, v. PARIS ADULT THEATRE II, et al:

4. The Court erred in finding and declaring the 16mm motion picture film entitled "MAGIC MIRROR" not obscene.
5. The Court erred in refusing to enjoin the Defendants from exhibiting said motion picture film entitled "MAGIC MIRROR."
6. The Court erred in dismissing Appellants complaint against the Defendants.

Each of the aforesaid cases is equitable in nature over which the Supreme Court of Georgia has exclusive appellant jurisdiction.

THOMAS E. MORAN

W. BAER ENDICTOR
Attorneys for Appellants.

(Certificate of Service omitted in printing)

* * * * *

Supreme Court of the State of Georgia
Clerk's Office Atlanta
March 21, 1972.

I, Joline B. Williams, Clerk of the Supreme Court of Georgia, do hereby certify that the foregoing pages, consecutively numbered 1 through 138, hereto attached, contain a true and complete copy of the record, and the enclosed two cannisters of film are those filed in the Supreme Court of Georgia in Case No. 26631, Slaton, District Attorney, et al v. Paris Adult Theatre I et al, as appears from the records and files in this office.

Witness my signature and the seal of the said court hereto affixed the day and year above written.

Joline B. Williams
Clerk.

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IN THE
Supreme Court of the United States

October Term, 1971

No. _____

PARIS ADULT THEATRE I,

Petitioner,

v.

**LEWIS R. SLATON, As District Attorney,
Atlanta Judicial Circuit, and**

**HINSON McAULIFFE, As Solicitor General of
the Criminal Court of Fulton County, Georgia,**
Respondents.

PARIS ADULT THEATRE II,

Petitioner,

v.

**LEWIS R. SLATON, As District Attorney,
Atlanta Judicial Circuit, and**

**HINSON McAULIFFE, As Solicitor General of
the Criminal Court of Fulton County, Georgia,**
Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA**

Paris Adult Theatre I and Paris Adult Theatre II,
Petitioners, pray that a Writ of Certiorari issue to review the
judgment of the Supreme Court of Georgia, entered in this
case on November 18, 1971.

OPINIONS BELOW

Two movies shown, respectively, at Paris Adult Theatre I and Paris Adult Theatre II, were found not to be obscene in the constitutional sense as a matter of law by the Trial Court in two equitable proceedings to have the films declared obscene, which were consolidated for trial. The opinion of the Trial Court is unreported, but a copy thereof is attached hereto as Appendix "A". Respondents herein appealed each case to the Supreme Court of Georgia and that Court found the movies "Magic Mirror" and "It All Comes Out In The End" to be obscene in an opinion applicable to both cases, dated November 5, 1971. That opinion is reproduced herein as Appendix "B". Because the Supreme Court of Georgia overlooked the Stipulation of Record filed by the parties in that Court, which pointed out that the Trial Court hearing had been a final hearing on the merits, both sides filed Petitions for Rehearing. Both Petitions for Rehearing were denied by the Court on November 18, 1971, and a new opinion was substituted on that date for the Court's first opinion. The final opinion of the Supreme Court of Georgia is attached hereto as Exhibit "C". That opinion is reported at 228 Ga. 343 (1971).

JURISDICTION

The Supreme Court denied the Petitions for Rehearing and substituted its final opinion for that entered on November 5, 1971 on November 18, 1971. This Petition For A Writ Of Certiorari is filed within ninety (90) days of that date. Jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether The Two (2) Motion Picture Films Which Are The Subject Matter Of These Proceedings, And Determined By The Trial Court To Be Not Obscene, But By The Supreme Court Of The State Of Georgia To Be Obscene, Are Not Obscene In The Constitutional Sense And Are Protected Expression Under The *First* and *Fourteenth Amendments* To The *United States Constitution*?

2. Whether There Can Be A Constitutionally Valid Judicial Determination Of Obscenity As To Each Of The Films Brought Before The Supreme Court, Consistent With Petitioners' Rights To Procedural And Substantive Due Process Required By The *Fifth* and *Fourteenth Amendments* To The *Constitution Of The United States*, In The Absence Of Any Affirmative Evidence On Each Of The Constitutionally Relevant Elements Of The Standards For Judging Proscribable Obscenity Under The *First Amendment*?

3. Whether The State Of Georgia May, Consistent With The *First*, *Fourth*, *Fifth*, and *Fourteenth Amendments* To The *Constitution Of The United States*, Utilize *Ad Hoc* Procedures To Enjoin Dissemination Of Presumptively Protected *First Amendment* Materials Where There Is No Statutory Or Authoritative Judicial Decision Authorizing The Same With Appropriate Procedural Safeguards?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the *First*, *Fifth*, *Sixth*, and *Fourteenth Amendments* to the *Constitution of the United States* and the provisions of *Georgia Code* §26-2101 are set forth in Appendix "D" hereto.

STATEMENT OF THE CASE

Petitioners Paris Adult Theatre I and Paris Adult Theatre II comprise an "Adults Only" theatre at 320 Peachtree Street, N.E., Atlanta, Georgia. Entrance to each of the two theatres is gained through a common lobby. On December 28, 1970, the movie, "It All Comes Out In The End" was showing in one theatre and the movie, "Magic Mirror" was showing in the other. Investigators of the Criminal Court of Fulton County viewed each of the films on the above date. Subsequently, on the same day, two separate complaints (one for each film and theatre) were filed in equity, asking that the films be declared obscene and that their further exhibition be temporarily and permanently enjoined after a hearing on the issue of obscenity. Various personnel of the theatres, none of whom are appellants herein, were served with the complaints and the order of the Superior Court of Fulton County temporarily restraining and enjoining the defendants from concealing, destroying, altering or removing the motion picture films from the jurisdiction of the Court. Defendants were further ordered to have one print each of the films, as they were exhibited on the 28th day of December, 1970, in Court on the 13th day of January, 1971, together with the proper equipment for viewing the same.

On the 13th day of January, 1971, the films were produced by attorneys for the theatres, after one of the defendants served had been held in contempt for refusing to furnish the films on the ground that to do so might incriminate him.

The hearing was stipulated by the parties to be a final one. At said hearing on the issue of the obscenity of the

films, no evidence was introduced by Respondents as to their obscenity, except the films themselves. There was no evidence that the films, when considered as a whole, predominantly appealed to a prurient interest in nudity, sex or excretion. There was no evidence that said films were patently offensive because they went substantially beyond the customary limits of candor in the depiction of sex or nudity, applying contemporary community standards. There was no evidence by the Respondent of any kind as to what constituted the contemporary community standards of any community, local, state, or national.

On the other hand, Petitioners produced testimony that the predominant appeal of the films was not to a prurient interest in sex and that the films were of value to society, and did not go substantially beyond the customary limits of candor in the representation of sex or nudity.

Evidence revealed that the theatres were for "Adults Only" and that the films were not advertised, except as to their name. There was no evidence that minors had ever entered the theatres or seen the films.

At the conclusion of the evidence, the Trial Court took under advisement the Motions to Dismiss filed by Petitioners which raised, *inter alia*, the contention that the films were not obscene in the constitutional sense as a matter of law and were protected expression under the *First* and *Fourteenth Amendments* to the *Constitution of the United States*. Subsequently, the Trial Court granted the Motions to Dismiss on the ground that the films were not obscene. Timely appeal was taken by Respondents, and the Trial Court was reversed on November 5, 1971, with Petitions for Rehearing being denied on November 18, 1971.

REASONS FOR GRANTING THE WRIT

1. THE TWO (2) MOTION PICTURE FILMS WHICH ARE THE SUBJECT MATTER OF THESE PROCEEDINGS, AND DETERMINED BY THE TRIAL COURT TO BE NOT OBSCENE, BUT BY THE SUPREME COURT OF THE STATE OF GEORGIA TO BE OBSCENE, ARE NOT OBSCENE IN THE CONSTITUTIONAL SENSE AND ARE PROTECTED EXPRESSION UNDER THE *FIRST AND FOURTEENTH AMENDMENTS* TO THE *UNITED STATES CONSTITUTION*.

At the time of the hearing before the Trial Court in the case at bar, the Prosecution contended that the two (2) movies were obscene under Georgia Law and under the *First Amendment* to the *Constitution of the United States*. Counsel for Petitioners contended that the two (2) motion picture films before the Court were not hard-core pornography or obscene in the constitutional sense as set forth in the various constitutional standards for judging obscenity set forth by the members of this Court in *Redrup v. New York*, 386 U.S. 767 (1967). Petitioners, by their counsel, further contended before the Trial Court that the movies were, at the most, borderline, as would be all publications that dealt with an erotic theme, but that did not render them obscene in the constitutional sense.

Counsel for Petitioners further contended that borderline publications are entitled to the mantle of the full constitutional protections of Free Speech and Press under the *First and Fourteenth Amendments* to the *Constitution of the United States* unless the conduct of the exhibitor was such as to encroach on the rights of others whose responsibility it was

for the State of Georgia to protect through its legal processes.

In this regard, Counsel for Petitioners was relying on the words of the Court set forth in *Roth v. United States*, 354 U.S. 476 (1957) at page 489 where it was written:

"The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the State. The door barring federal and state intrusion into this area (obscenity litigation and the free press rationable) cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest."

Counsel for Petitioners herein urged to the Trial Court that the comment in the dissent of Mr. Justice Stewart in *Ginzburg v. United States*, 383 U.S. 463 (1966) which later became the foundation of the *Per Curiam* opinion of the Court. *Redrup v. People of the State of New York*, *supra*, was particularly applicable where the learned Justice wrote, in part, as follows at footnote 1 of his opinion at page 498:

"1. Different constitutional questions would arise in a case involving an assault upon individual privacy by publication in a manner so blatant or obtrusive as to make it difficult or impossible for an unwilling individual to avoid exposure to it. Cf. e.g., *Breard vs. Alexandria*, 341 U.S. 622; *Public Utilities Commission v. Pollak*, 343 U.S. 451; *Griswold vs. Connecticut*, 381 U.S. 479. Still other considerations might come

into play with respect to laws limited in their effect to those deemed insufficiently adult to make an informed choice. No such issues were tendered in this case."

The words of the Court in the *Per Curiam* Opinion in *Redrup v. New York*, *supra* contain in essence the same observation made by Mr. Justice Stewart in *Ginzburg v. U.S.* where the Court at page 769 wrote as follows:

"IN NONE of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See *Prince vs. Massachusetts*, 321 U.S. 158; cf. *Butler vs. Michigan*, 352 U.S. 380. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. *Breard vs. Alexandria*, 341 U.S. 622; *Public Utilities Comm'n vs. Pollak*, 343 U.S. 622. And in none was there evidence of the sort of 'pandering' which the Court found significant in *Ginzburg vs. United States*, 383 U.S. 462."

The Trial Court was also exposed to a list of the cases considered by the U.S. Supreme Court which had been reversed predicated on *Redrup v. New York*, *Supra*. Predicated on what the Trial Court understood was meant by the various rulings of this Court as to non-hard-core material, the said Trial Court sitting as both Judge and Jury in its written opinion dated April 12, 1971 and reproduced in full in the Appendix to this Petition, stated in part as follows:

"Assuming that obscenity is established by a finding that the actors cavorted about in the nude indiscriminately, then these films may fairly be

considered obscene. Both films are clearly designed to entertain the spectator and perhaps, depending on the viewer, to appeal to his or her prurient interest. The portrayal of the sex act is undertaken; but the act itself is consistently only a simulated one if, indeed, the viewer can assume an act of intercourse or of fellatio is occurring from the machinations which are portrayed on the screen. Each of the films is childish, unimaginative, and altogether boring in its sameness."

"It appears to the Court that the display of these films in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against exposure of these films to minors, is constitutionally permissible."

"It is the Judgement of this Court that the films, even though they display the human body and the human personality in a most degrading fashion, are not obscene."

The Trial Court was, we suggest, correctly following the law as it has been ennuiciated by this Court in the decisional processes. This Court has considered films of even a more explicit nature than the motions pictures at bar and in the absence of factors which would suggest circumstances of dissemination that would intrude onto the rights of others, or minors, have reversed the following based on *Redrup v. New York, Supra*:

1. *Harry Schackman v. California*, 388 U.S. 454 (1967).

This Court reversed the Superior Court of California which had affirmed the conviction of appellant for utilizing coin operated "peep-show movies" that were charged as being obscene. The Supreme Court decision was per curiam,

contained no description of the movies and referred to *Redrup* as controlling authority for holding the movies not obscene.

A look at the travel of the case will reveal a description of the films by the United States District Court for the Central District of California in the matter styled *Schackman v. Arnebergh*, 258 F. Supp. 983 (1966). The appellant originally had been arrested for trial in a California state court. The defendant thereafter filed a complaint in federal court seeking to convene a three-judge court on constitutional grounds, which relief was refused. An appeal was then taken to the Supreme Court of the United States which held by per curiam opinion that the proper route of appeal in those circumstances was by way of the Court of Appeals and denied the appeal, *Schackman v. Arnebergh*, 387 U.S. 427. Thereafter the state trial court convicted the defendant and he appealed through the state courts and ultimately to the Supreme Court of the United States where his conviction was reversed and the Court held the material not obscene.

The descriptive opinion in the federal district court, 258 F. Supp. 983, stated, *inter alia*:

"1. As to 0-12:

"The film consists of a female model clothed in a white blouse open in the front, a half-bra which exposes the upper half of the breasts including the nipples and a pair of white capri pants (which are soon discarded) under which the model wears a pair of sheer panties through which the pubic hair and region are clearly visible. The film consists of the model moving and undulating upon a bed, moving her hands, lips and torso, all clearly indicative of engaging

in sexual activity, including simulated intercourse and invitations to engage in intercourse.

"There is no music, sound, story line or dancing other than exaggerated body movements. On at least three occasions, the female by lip articulation is observed to state, 'fuck you,' 'fuck me.' The dominant theme of the film taken as a whole, obviously is designed to appeal to the prurient interest in sex of the viewer and is patently offensive in that the focus of the camera returns again and again to the genital and rectal area clearly showing the pubic hair and the outline of the external parts of the female genital area."

"2. 0-7:

"The model wears a garter belt and sheer transparent panties through which the pubic hair and external parts of the genitalia area clearly visible. For at least the last one-half of the film, the breasts are completely exposed. At one time the model pulls her panties down so that the pubic hair is exposed to view. Again, the focus of the camera is emphasized on the pubic and rectal regions and the model continuously uses her tongue and mouth to simulate a desire for, or enjoyment of, acts of a sexual nature. The dominant theme of the film, taken as a whole, appeals to a prurient interest in sex of the viewer and is patently offensive in its emphasis on the genital and rectal areas, clearly showing the pubic hair and external parts of the female genital area."

"3. D-15 was held to be substantially the same in character and quality as the films 0-12 and 0-7.

"33. The film E-44 'Susan, referred to in paragraph 11 of the petitioners' complaint and introduced as Exhibit 4, is virtually the same as Exhibits 1, 2 and 3. In addition, the model uses her hands, fingers, lips and tongue to simulate an act of oral copulation. Again, the pubic hair is visible together with the external parts of the genitalia and the focus of the camera emphasizes this area. The model continuously simulates acts of a sexual nature, including sexual intercourse and invitations to engage in such activity. The dominant theme of the film, taken as a whole, is to the prurient interest in sex of the viewer. It is patently offensive and is utterly without redeeming social importance.

"34. The film known as Exhibit 19, of the Los Angeles Municipal Court Case No. 150754, referred to in paragraph 4 of the complaint and introduced as Exhibit 5, was viewed by the Court. The Court finds Exhibit 5 to be not quite as repugnant nor flagrant an example as Exhibits 1 through 4. In Exhibit 5, the pubic hair cannot be seen and the simulation of sexual intercourse is not as patent. Still, the model moves her body and hands in obviously sexual ways to simulate sexual activities and the camera's focus again emphasizes the pubic and rectal regions. The dominant theme of the film, taken as a whole, is to a prurient interest in sex of the viewer. It is patently offensive and is utterly without redeeming social importance."

In the Opinion it was further stated:

"The Court concludes as a matter of law that the exhibits and each of them are clearly, unequivocally and incontrovertibly obscene and pornographic in the hard core sense because they come within the reasonable

purview and ambit of both the Federal judicial definition of obscenity and hard core pornography."

This Court found the above described films not to be obscene in the constitutional sense, thus in total disagreement with the findings of the learned Federal District Court trial judge. See: *Schackman v. California*, 388 U.S. 454 (1967).

2. *I. M. Amusement Corporation v. Ohio*, 389 U.S. 573 (1968).

Film strip of two nude females acting like Lesbians and fondling one another found not constitutionally obscene, citing *Redrup, supra*, as authority.

See the lower court case styled *State v. I. & M. Amusements, Inc.*, 226 N.E. 2d 567, where the Supreme Court of Ohio affirmed the Court of Appeals of Ohio, Hamilton County, convicting a motion picture corporation of exhibiting an obscene motion picture film.

The Supreme Court of Ohio set forth the descriptive testimony of an expert witness at the trial level:

"The same thing might be said of the defense expert witness on the subject of motion picture standards and practices, that the one segment of the film in question was simply 'a documentation of moving pinups, in some cases static pinups, '-a pinup being 'simply females who are, who have exposed, who are undressed within the convention of a pinup. A pinup is simply a convention of undress which excludes any dress other than a covering in the lower regions of some standard form. The movie I say was a documentation of a series of pinups who, in some cases, were in motion. In most cases were static.'"

Thereafter the Court set forth the descriptive quote of the trial judge:

"In addition to either the static or moving pinups, the court below made a specific finding in regard to one series of scenes in the film that, 'two women, at least nude to the waist, going through actions that could lead to no conclusion in my opinion except that they were behaving like lesbians.'"

However, when the case reached this Court in *I. M. Amusement Corp. v. Ohio*, 389 U.S. 573, the state decisions were reversed in a per curiam opinion based upon *Redrup* holding in essence that the motion picture film was not obscene for adults.

3. *Robert-Arthur Management Corp. v. Tennessee*, 388 U.S. 578 (1968).

Motion picture film entitled *Mondo Freudo* showing women caressing one another and acting as Lesbians found not constitutionally obscene based on *Redrup*, *supra*, as the controlling authority therefor.

See the case styled *Robert Arthur Management Corp. v. State of Tennessee*, 414 S.W. 2d 638 (1967), wherein the Supreme Court of Tennessee, in affirming the trial court's finding that the film *Mondo Freudo* was obscene, stated:

"We have reviewed the evidence and have seen the film. We agree with the trial judge. This film, considered as a whole, not only predominantly appeals to the prurient interest; in fact it has no other possible appeal. If this film is not patently offensive to the public or does not go substantially

beyond customary limits of candor in dealing with sex, then we do not think it possible to make such a film. Under the third element necessary in a finding of obscenity witnesses for the exhibitor testified the film informed people of certain existing conditions. This film does inform people sexual filth exists in the world. We presume the argument to be, since sexual filth does exist, and this film only informs people of such, then the film is not obscene. If this be the argument we reject such. The effect of the film is just to add to the sexual filth already in the world. We find the film to be devoid of any literary, scientific or artistic value and utterly without social importance."

4. *Cain v. Kentucky*, 397 U.S. 319 (March 23, 1970).

This decision involved the motion picture *I, A Woman*.

A description of the film is set forth by the Court of Appeals for Kentucky in the case styled *Cain v. Commonwealth of Kentucky*, 437 S.W. 2d 769 (1969), wherein it was stated:

"We have viewed the evidence presented to the trial jury. The film is a 90-minute motion picture devoted almost entirely to the sexual encounters of one female by the name of Eve. It opens by showing Eve nude in her bedchamber engaged in the practice of caressing herself in a suggestive manner to the accompaniment of her father's violin. She progresses to a passionate love scene with her fiance, Svend, while lying fully clothed on top of him in her bedchamber. This act is performed with the camera full on the subject. From this the film proceeds to the act of intercourse with a married patient, Heinz Goertzen, in a hospital room where Eve is employed

as a nurse. This act she solicits with the use of nude photographs taken of her by her fiancé for this specific purpose. During the course of the sequence, the camera focuses upon the head of the male partner and the stomach area of the female partner. It shows the male partner caressing with kisses the area between the navel and the pubic hair. The camera then shifts during the act of intercourse to the face of the female subject. After this, the film follows the life of Eve from one act of sexual intercourse to another until it has been accomplished some five times, all with different partners. Each time the act is as vividly portrayed upon the screen as was the scene in the hospital room. In one instance the sex act is in the form of rape. The film represents nothing more than a biography of sexuality. There is no story told in the film; it is nothing more than repetitious episodes of nymphomania. Nudity is exposed in such manner that if the subject had posed in person instead of on film she would have immediately been arrested for indecent exposure. We are of the opinion that the jury not only had sufficient evidence before it upon which to base its verdict but that this evidence was overwhelming."

This Court reversed this judgment in a 6-2 per curiam decision, citing *Redrup v. New York, supra*, as authority therefor.

5. *People of California v. Pinkus*, 400 U.S. 922 (1970).

This Court left standing a decision of the Ninth Circuit which held a stag movie graphically depicting a woman engaged in masturbation not to be obscene by a divided Court in affirming the judgment of the Ninth Circuit of Appeals in case there styled as *Pinkus v. Pitchess*, 429 F.2d 416.

Pinkus was charged with committing sixteen violations of the California Obscenity Statute but only nine of the sixteen were submitted to the Jury and he was found guilty. The Petition for habeas corpus followed and the Circuit Court of Appeals ultimately reversed and in doing so, stated as follows:

"We have concluded that it was. The 'worst' of the material is described as a motion picture of a woman who, disrobed, feigns some type of sexual satisfaction which is self-induced. The film is apparently typical of the usual 'stag' movies which the courts encounter with increasing frequency. In the state court trial, the prosecution introduced no persuasive testimony that the material was offensive to contemporary notions of free expression. The district judge, as did the state court jury, made the factual determination that the film was obscene, but we have concluded that we cannot reconcile the determination with Supreme Court decisions in several cases involving comparable material. See, e.g., *Bloss v. Dykema*, U.S. , 38 U.S.L.W. 3477 (1970); *Redrup v. New York*, 386 U.S. 767, 18 L. Ed. 2d 515, 87 Sup. Ct. 1414 (1967). See especially, *Aday v. United States*, 388 U.S. 447, 18 L. Ed. 2d 1309, 87 Sup. Ct. 2095 (1967), *revg.* 357 F. 2d 855 (6th Cir. 1966).

6. *Bloss v. Michigan*, 402 U.S. 938 (1971).

This Court reversed the conviction for showing an obscene movie entitled "A Woman's Urge" of Floyd G. Bloss, citing *Redrup*. The Court of Appeals for the State of Michigan in its decision entitled *The People of the State of Michigan v. Floyd G. Bloss*, had adopted the trial judge's recital of the pertinent facts:

"The pertinent facts are set forth in the trial judge's decision on the motion for new trial:

"The testimony at the trial indicated that "A Woman's Urge" was shown at the Capri Theatre from February 2nd to February 8, 1966. On the evening of February 3, 1966 certain police officers and officials of the city of Grand Rapids, together with professors from Calvin and Aquinas Colleges attended the showing of "A Woman's Urge". Thereafter, a meeting was held at the prosecuting attorney's office and on the evening of February 8, 1966, members of the vice squad purchased tickets for the showing of "A Woman's Urge" and saw the entire film. Immediately thereafter, two members of the vice squad, who had seen the movie, went to the projection booth, there found Billy C. Sturgess in the projection booth, rewinding the film to "A Woman's Urge". The officers identified themselves and arrested Mr. Sturgess and seized the film incidental to the arrest. Thereafter they permitted Mr. Sturgess to continue showing the motion picture which was then being shown and subsequently brought him to the police department where he was served with a complaint and warrant. Likewise a complaint and warrant were served upon Mr. Bloss, who came to the police department at the request of the police officers. At the trial several police officers testified in detail as to the movie and applied the "Roth test" to the movie. In addition an expert witness from Aquinas College was called who testified relative to the movie and applied the Roth test. The jury, after extensive deliberation, convicted Mr. Bloss.

"We must decide, therefore, whether the film is obscene in the constitutional sense as delineated by the Supreme Court of the United States. See *Roth v. United States*, *supra*; *Redrup v. State of New York* (1967) 386 U.S. 767 (87 S.Ct. 1414, 18 L.Ed. 2d 515); *Memoirs v. Massachusetts* (1966), 383 U.S. 413 (86 S.Ct. 975, 16 L.Ed. 2d 1); *Ginzburg v. United States* (1966) 383 U.S. 463 (86 S.Ct. 942, 16 L.Ed. 2d 31); *Mishkin v. New York* (1966) 383 U.S. 502 (86 S.Ct. 958, 16 L.Ed. 2d 56). For us to find that this movie is obscene, we must find that the dominant theme of the movie as a whole appeals to prurient interest in sex, that it is patently offensive because it goes beyond contemporary community standards relating to the description or representation of sexual matters, and that it is utterly without redeeming social value. *Roth v. United States*, *supra*. Unless we find that these three elements coalesce, we cannot find that it is obscene. *Memoirs of a Woman of Pleasure v. Massachusetts*, *supra*, 419. We viewed the film, and we find the necessary coalescence here. Therefore, we find the film to be obscene.

"The film deals with the problems of a seemingly oversexed young woman. Although it has a pseudo psychoanalytical approach, its primary appeal is to prurient interest in sex. This prurient appeal is the dominant theme of the movie as a whole. The film is utterly without redeeming social value. Further, we find that it goes beyond the contemporary national community standards in its descriptions and representations of sexual matters. We would note here that in making this decision as to whether this film goes beyond the contemporary standards, we took into

consideration not just the content of the film, but also the impact of the conditions under which this content is conveyed to the viewer. By this we mean that even though the acts and occurrences if they were described in the written word would not be obscene, the visual impact of seeing the same thing acted out in a darkened room with sound accompaniment may cause it to be obscene. We find support for this distinction in *Landau v. Fording* (1966) 245 Cal. App. 2d 820 (54 Cal. Rptr. 177), *aff'd per curiam*, 38 U.S. 456 (87 S.Ct. 2109, 18 L.Ed.2d 1317) (1967) 5-4, *reh. denied*, 389 U.S. 889 (88 S.Ct. 16, 19 L. Ed. 2d 199) (1967)."

Yet, the Supreme Court of the United States granted the *Petition for a Writ of Certiorari* and reversed.

7. *Hartstein v. Missouri* No. 71-190, decided December 14, 1971, 10 CrL 4093, U.S. , S.Ct. , L.Ed.2d (1971).

On Tuesday, December 14, 1971, this Court reversed an obscenity conviction obtained in the State of Missouri. The reversal was based on *Redrup v. People of the State of New York*, 386 U.S. 767 (1967).

The Supreme Court of Missouri described the material involved, a motion picture entitled "Night of Lust," as follows:

"...[I]n most if not all instances without any relation to the plot, if any can be said to exist, are scenes of nude women including closeup portrayals of naked breasts. . . 'Night of Lust' is approximately 65 minutes in length, and approximately 40 of those

minutes consist of scenes of nude girls in various poses, actions, and sequences, which bear no relation to a plot, and apparently are presented for the sole purpose of depicting nude girls in activity suggestive of sexual intercourse or of homosexual activity.

...
 "Under no possible standard could the motion picture 'Night of Lust' be related to art, literature or scientific works. It is the portrayal of nude women, which when considered alone may not be considered obscene according to language in *Manual Enterprises, Inc. v. Day*, *supra*, or obscene for adults. *Ginsberg v. State of New York*, *supra*. However, that is not the limits of the portrayal in 'Night of Lust.' By reason of the closeup scenes, and by use of nude body gyrations and undulations the motion picture suggests promiscuous sexual intercourse and homosexual activity which is totally unrelated to any plot. Such scenes are patently offensive and are incorporated into the picture only to appear to the prurient interest of the viewer. Such portrayals are not 'fragmentary and fleeting,' *Jacobellis v. State of Ohio*, *supra*, but because of the quantity of such portrayals, the result is that the dominant theme of the picture, when considered as a whole, is the suggestion of promiscuous sexual intercourse and homosexuality." (Emphasis added.)

8. *Wiener v. California*, No. 71-443, decided December 14, 1971, 10 CrL 4093, U.S. S.Ct. L.Ed.2d (1971).

This Court reversed judgment of the Appellate Department, Superior Court of California, County of San

Diego, based on *Redrup v. People of the State of New York, supra*. The following magazines and films were the subject matter of the California judgment:

- A magazine entitled "My-O-My"
- A magazine entitled "Wild-n-Sassy"
- A magazine entitled "Hello"
- A magazine entitled "The Ballers," No. 1
- A magazine entitled "Psychedelic"
- A 200' color film
- A 1200' color film
- A 16 millimeter 400' color film
- A 16 millimeter 400' color film
- An 8 millimeter 400' color film

The California Superior Court, Appellate Department, affirmed the trial court:

"We do not engage in the task of translating the motion pictures or the photographs into words. Suffice it to say that we have performed one duty (as properly suggested by appellants), and exercised our independent judgment with regard to each exhibit. We conclude that under the present state of the law as developed by Roth and subsequent cases, the evidence presented by the People (with the one exception hereinafter noted) was legally and factually sufficient to support the jury's findings of guilt. We find ample evidence to support the three principal requirements already noted, to wit:

'That 1. The dominant theme of the material taken as a whole appeals to a prurient interest in sex;

'2. The material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and

'3. The material is utterly without redeeming social value.' "

Yet, this Court did reverse the conviction, without opinion provisions on *Redrup v. New York, supra*.

The Georgia Supreme Court in it's first decision issued on November 5, 1971 held that there was probable cause to believe that the films were obscene and the trial judge had erred in making a final adjudication of the merits of the case. When it was pointed out to the Georgia Supreme Court by both the Prosecutor and Counsel for Petitioners, in their respective Petitions for Rehearing that the trial Court was authorized to make a final adjudication because the parties had stipulated that the hearing before the trial judge to be the final determination on this matter and that no further hearings were contemplated. When the Georgia Supreme Court was confronted with this oversight on their part which made their opinion clearly erroneous, they filed a revised opinion on November 18, 1971 to replace the one originally filed in which they characterized the films in this case as "hard core pornography." and held it unprotected by the First and Fourteenth Amendments to the U.S. Constitution.

After filing their revised opinion, on November 18, 1971, they did on the same date deny both the Motions for Rehearing filed by Counsel for both sides. The original opinion, and the revised or corrected opinions of this Court are set forth in the Appendix.

It would appear that the Georgia Supreme Court when confronted with the first case in its history, where the trial judge after considering all the evidence and law in the case found the publications not obscene, could not leave the lower court decision standing and undertook on its own to rule the motion picture film obscene in the constitutional sense in the complete absence of any evidence in the trial record or in the briefs and argument before it on which to base such highly unusual reversal of the said trial court. The only affirmative evidence adduced by the prosecution was that the Paris Adult Theatre I and II exhibited to adults only, no minors permitted on the premises and that a modest but polite forewarning was on the door to prevent potential intrusion into the privacy of unsuspecting adults who wished to avoid confrontation with erotic materials. Further, the only evidence before the trial Court and Supreme Court of Georgia demonstrated that there was no *Ginzburg*-type pandering involved in this case.

It would be time-consuming and fruitless to detail each and every case that has appeared before the Court after that time, but it is significant to note a trend developed, which found fruition in 1967 in the case of *Redrup v. New York*, 386 U.S. 767 (1967). For the first time, it became relatively clear what the Court meant when in *Roth* it made the reference to need to prevent erosion in the First Amendment rights by Congress or by the state to permit intrusion or encroachment only when necessary to prevent encroachment upon more important interests, when the Court, in its *per curiam* opinion, held the materials before it could not be said to be obscene in the constitutional sense. Thereafter, the Court laid down a suggested criteria for balancing the determination of whether material could be said to be obscene with the emphasis on the manner of dissemination, rather than on the object of dissemination.

The Court, in essence, suggested that where there was no evidence of sales to minors under state statutes reflecting a specific and limited concern for juveniles, nor where there was any dissemination or attempt at dissemination in a manner calculated to intrude into the privacy of an unwilling individual who wanted to avoid confrontation with this kind of material, or where there was no evidence of the type of "pandering" which the Court had seen significant in the case, *Ginzburg v. United States*,¹ 383 U.S. 463 (1966), that no obscenity conviction or suppression could follow. Thereafter, the Court has reversed some thirty-three (33) cases, representing a wide cross-section from both federal and state, inferior and appellate courts, involving both criminal and civil condemnations, and the Court, in reversing these cases, cited only as its authority *Redrup v. New York*, *supra*. The cases reversed are: *Austin v. Kentucky*, 386 U.S. 767 (1967); *Gent v. Arkansas*, 386 U.S. 767 (1967); *Ratner v. California*, 388 U.S. 442 (1967); *Cobert v. New York*, 388 U.S. 443 (1967); *Keney v. New York*, 388 U.S. 440 (1967); *Friedman v. New York*, 388 U.S. 441 (1967); *Aday v. United States*, 388 U.S. 447 (1967); *Avansino v. New York*, 388 U.S. 446 (1967); *Sheperd v. New York*, 388 U.S. 444 (1967); *Corinth Publications, Inc. v. Wesberry*, 388 U.S. 448 (1967); *Books, Inc. v. United States*, 388 U.S. 449 (1967); *Mazes v. Ohio*, 388 U.S. 453 (1967); *Schackman v. California*, 388 U.S. 454 (1967); *Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Central Magazines Sales, Ltd. v. United States*, 389 U.S. 50 (1967); *Potomac News Co. v. United States*, 389 U.S. 47 (1967); *Conner v. City of Hammond*, 389 U.S. 48 (1967); *Chance v. California*, 389 U.S. 89 (1967); *I.M. Amusement Corporation v. Ohio*, 389 U.S. 573 (1968); *Robert-Arthur Management Corp. v. State of Tennessee*, 388 U.S. 578 (1968); *Felton v. City of Pensacola*, 390 U.S. 340 (1968); *Henry v. State of Louisiana*, 392 U.S. 655 (1968); *Carlos v.*

New York, 396 U.S. 119 (1969); *Cain v. Kentucky*, 397 U.S. 319 (1970); *Bloss v. Dykema*, 398 U.S. 278 (1970); *Walker v. Ohio*, 398 U.S. 434 (1970); *Hoyt, et al. v. State of Minnesota*, 399 U.S. 524 (1970); *Childs v. Oregon*, 401 U.S. 1006 (1971); *Bloss v. Michigan*, 402 U.S. 938 (1971); *Burgin v. South Carolina*, 404 U.S. 806 (1971); *Wiener v. California*, No. 71-443 10 CrL 4093 (December 14, 1971); *Hartstein v. Missouri*, No. 71-190, 10 CrL 4093 (December 14, 1971).

In none of the motion pictures involved, in none are there explicitly depicted sexual intercourse, fellatio, cunnilingus, or oral intercourse. The motion picture films are comparable to the matter depicted in *Burgin v. South Carolina*, *supra*; *Bloss v. Dykema*, *supra*; and *Wiener v. California*, *supra*.

From the rationale of the holdings of this Court, it is suggested that five very important principles emerge.

First, that "girlie" pictures and magazines of nude females in various poses as well as pictures and magazines of nude males and male and female, male and male, female and female, are not obscene in the constitutional sense absent the graphic depiction of explicit sexual acts.

The second principle is that all literary publications containing story lines illustrated or non-illustrated hard-cover or paperback are protected expression and conversely are not obscene in the constitutional sense.

The third principle is that pictorial portrayal on motion picture film of nudes either male or female together with suggested sexual congress or suggested variant sexual acts constitute protected expression under the *First Amendment*

absent actual depiction of these acts where no imagination is required to see the acts in progress, and where no pretense of artistic (social) value is demonstrated. That is, mere body movement or vocal utterances and the like, separate and combined, do not suffice to meet the test of obscenity. The film must show actual insertion or genital travel in the actual act of intercourse or sodomy, or actual act of cunnilingus or fellatio, absent a pretence of artistic (social) merit.

The fourth principle, and probably the most important, is that if the particular material meets the proscribable tests as set forth heretofore there may still be valid consideration sufficient to encompass the material under the protective umbrella of the *First Amendment* freedoms. This principle, often times referred to as "redeeming social value," is that the act performs a purpose within the context of the material and the work conveys an idea or attempts to convey an idea for the creator or to the recipient. Therefore, if in fact there is a modicum of redeeming social value, the materials may not be proscribed.

The fifth principle lies in the manner of dissemination. Where materials are disseminated to willing adults in an adults-only environment, i.e., "adults only theatre" or "adults only bookstores" and not pandered or foisted upon an individual wishing to avoid confrontation with it or disseminated to juveniles, the materials are not proscribable.

Under controlling decisions of this Court, the motion picture films herein involved are not obscene in the constitutional sense, especially where, as here, none of the factors deemed important in *Redrup v. New York*, *supra*, are present.

2. THERE CANNOT BE A CONSTITUTIONALLY VALID JUDICIAL DETERMINATION OF OBSCENITY AS TO EACH OF THE FILMS BROUGHT BEFORE THE SUPREME COURT, CONSISTENT WITH PETITIONERS' RIGHTS TO PROCEDURAL AND SUBSTANTIVE DUE PROCESS REQUIRED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, IN THE ABSENCE OF ANY AFFIRMATIVE EVIDENCE ON EACH OF THE CONSTITUTIONALLY RELEVANT ELEMENTS OF THE STANDARDS FOR JUDGING PROSCRIBABLE OBSCENITY UNDER THE FIRST AMENDMENT.

Since obscenity prosecutions or injunctive proceedings as in this case are in themselves fraught with vagueness, the courts have held that in such prosecutions or proceedings, undertaken under a constitutionally permissible basis, the prosecution or in this case, the State of Georgia, has the affirmative responsibility to adduce appropriate evidence to establish each element of its concept of obscenity, including contemporary community standards.

In *Re Giannini*, 72 Cal. Rptr. 655 (1968) the Supreme Court of California stated in pertinent part:

"We conclude the convictions must be set aside because the prosecution failed to introduce any evidence of community standards either that Iser's conduct appealed to prurient interest or offended contemporary standards of decency... To sanction convictions without expert evidence of community

standards encourages the jury to condemn as obscene or offensive to the particular juror... We conclude that the judgment must be vacated for lack of evidence as to whether applying contemporary community standards petitioner Isler's dance appealed to the prurient interests of the audience and offended accepted standards of decency."

The Supreme Court of the Commonwealth of Virginia likewise has held in the case of *House v. Commonwealth*, 169 S.E.2d 572 (1969), reported on September 5, 1969, on this issue as follows:

"In the first place there is no evidence that according to or applying contemporary community standards the dominant theme of the magazines in question appealed the prurient interest of the reader or that they were patently offensive because they affronted contemporary community standards relating to the description or representation of sexual matters. That is, there is no evidence that these publications were offensive because they affronted contemporary community standards relating to the description of such matters.

.....

As to the sufficiency of the evidence, we agree with the defendant that since the statute provides punishment for 'every person who knowingly... commercially distributes... any obscene matter, the burden was on the Commonwealth to show that the magazines were obscene and that the defendant knew they were obscene when he distributed them to retain dealer Swersky... In accord with this view we hold that in the absence of evidence that these magazines affronted the standards of the community, the

evidence on behalf of the Commonwealth was insufficient to sustain the conviction of the defendant."

The Supreme Court of the Commonwealth of Pennsylvania recently considered this issue in *Duggan v. Guild Theatre, Inc., et al*, 258 A.2d 865 (1969), and said in pertinent part as follows:

"Nor has the district attorney proved that this movie 'affronts contemporary community standards' relating to the representation of sexual matters. Each one of his witnesses called to testify as to community standards admitted that they had no idea what these standards were. The district attorney in his brief admits that he produced no expert testimony on this issue, yet urges us to find that the movie affronts contemporary standards. This we cannot do. Courts of law are not capable of deciding what contemporary standards are, without the benefit of any evidence whatsoever. Cf. *Dell Publications*, 427 Pa. at 193, 223 A.2d at 843.

"As for the third independent test, the district attorney has not proved 'Therese and Isabelle' to be utterly without redeeming social value

"Thus the Commonwealth has not shown, under any one of the three independent standards set forth in *Memoirs* and *Dell Publications* that 'Therese and Isabelle' is constitutionally obscene."

Speiser v. Randall, 357 U.S. 513, 2 L.Ed.2d 1460, 78 S.Ct. 1332:

"Where the transcendent value of speech is involved, due process certainly requires in the circumstances of

this case that the State bear the burden of persuasion to show that the appellants engaged in criminal speech. Cf. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 1 L.Ed. 2d 1469, 77 S.Ct. 1325, *supra*.

"The vice of the present procedure is that, where particular speech fails to close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, cf. *Dennis v. United States*, 341 U.S. 494, 95 L.Ed. 1137, 71 S.Ct. 857, *supra*, provide but shifting sands on which the litigant must maintain his position."

Smith v. California, 361 U.S. 147, 4 L. Ed. 2d 205, 80 S.Ct. 215, concurring Opinion of Justice Frankfurter:

"...[F]or community standards or the psychological or physiological consequences of questioned literature can as a matter of fact hardly be established except through experts. Therefore, to exclude as irrelevant evidence that goes to the very essence of the defense and therefor to the constitutional safeguards of due process. The determination of obscenity no doubt rests with judge or jury. Of course the testimony of experts would not displace judge or jury in determining the ultimate question whether the particular book is obscene, any more than the testimony of experts relating to the state of the art in patent suits determines the patent ability of a controverted device.

"There is no external measuring rod for obscenity. Neither, on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges. Since the law through its functionaries is 'applying contemporary community standards' in determining what constitutes obscenity, *Roth v. United States*, 354 U.S. 476, 489, 1 L.Ed.2d 1498, 1509, 77 S. Ct. 1304, it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those 'contemporary community standards' are. There interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge. It bears repetition that the determination of obscenity is for juror or judge not on the basis of his personel [sic] upbringing or restricted reflection or particular experience of life, but on the basis of 'contemporary community standards.' Can it be doubted that there is a great difference in what is to be deemed obscene in 1959 compared with what was deemed obscene in 1859?"

People v. Rosakos, 74 Cal. Rptr. 34 at 36 (1968):

"This case must be reversed for a second reason, which is the holding in *In re Giannini and Iser*, 69 A.C. 588, 72 Cal. Rptr. 655, 446 P. 2d 535.

"In that case the court was dealing with violations of Penal Code Section 314, subdivision (1) and Penal Code Section 647, subdivision (a). (The alleged offenses occurred in the presentation of a dance before an audience. The court in that case affords the dance *First Amendment* protection unless the dance is obscene. In order to determine whether or not the dance was obscene the court holds at page 599, 72

Cal. Rptr. at page 662, 446 P.2d at page 542, ... a finding of offensiveness to the accepted community standards of decency forms a prerequisite to a conclusion of obscenity,' and the court further states at pages 599-600, 72 Cal. Rptr. at page 663, 446 P.2d at page 543:

"Relying principally on the well established doctrine that jurors should not be endowed with the prerogative of imposing their own personal standards as the test of criminality of conduct, we hold that expert testimony should be introduced to establish community standards.

"We cannot assume that jurors in themselves necessarily express or reflect community standards; we must achieve so far as possible the application of an objective, rather than a subjective, determination of community standards.

"(2) In the case at bar no evidence of community standards was introduced. We therefore hold that the evidence is insufficient on the present record to sustain the conviction as to count VII.

"The judgment is reversed."

United States v. Klaw, 350 F.2d 155 (1965):

"Nor is mere 'patent offensiveness' enough. There must in addition be the requisite prurient appeal. Assuming that 'prurient appeal' can be adequately defined, there are still some questions: appeal to whose prurient interest? judge by whom? on what basis? For example, is it the average person' who applies 'contemporary community standards' to determine if the 'dominant theme' appeals to 'prurient interest' (of someone)? Or is it someone else

applying 'contemporary community standards' to determine that the 'dominant theme' appeals to 'prurient interest' of the 'average person'? Do 'contemporary community standards' operate to reduce potential prurient appeal? Or do they operate to establish that some 'redeeming social importance' is present? Or do they operate to measure the 'patent offensiveness' of an excess of candor? Again, does the 'dominant theme' indicate that the prospective prurient appeal is great or slight, or does it suggest that other themes will supply the redeeming social importance? Perhaps the *Roth* statement is too compact—an unsurprising failing in an initial formulation, the Court itself has acknowledged that it 'is not perfect.' *Jacobellis v. Ohio*, *supra*, 378 U.S. at 191, 84 S.Ct. 1676. But the difficulties of articulating an adequate substitute need not dictate immutable adherence to such a will-o'-the-wisp.

"Having in mind the constitutional constrictions on the breadth of legislation affecting the freedom of expression, if appeal to prurient interest—on either an 'average man' or a 'deviant typical recipient' basis—is the statutory concern, then it seems desirable, indeed essential, that such appeal to someone be shown to exist. This the Government's view of *Roth* does not require. Nor should it be sufficient merely that the disseminator or publicizer thinks such appeal exists. The stimulation and reaction with which the 'obscenity' laws are concerned are unlikely to be a problem if the appeal is felt by none of the recipients, but only by the disseminator. While such a person may in some other ways be a potential problem for society, the 'obscenity' laws are concerned are unlikely to be a problem if the appeal is felt by none of the recipients, but only by the disseminator. While such a person may in some other ways be a potential problem for society, the

'obscenity' laws do not seem best calculated to cope with him. Moreover, the Court stresses in *Roth* the 'effect' of the material on the people reached by it. See 354 U.S. at 490, 77 S.Ct. 1304.

"...And if proof of prurient stimulation and response is generally important, it is particularly necessary when the prurient interest may be that of a deviant segment of society whose reactions are hardly a matter of common knowledge.

.....

"However, some proof should be offered to demonstrate such appeal, thereby supplying the fact finders with knowledge of what appeals to prurient interest so that they have some basis for their conclusion. As was observed earlier in Klaw's troubles with the postal censors, 'obviously, the issue of what stirs the lust of the sexual deviate requires evidence of special competence.' *Klaw v. Schaffer, supra*, 151 F.Supp. at 539 n.6; see *Manual Enterprises, Inc. v. Day*, 110 U.S. App. D.C. 78, 289 F.2d 455 (1961, rev'd, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639 (1962)).

"In this case, although Judge Wyatt wisely suggested, and the Government considered, introduction of such evidence, there was none. Because of this Judge Wyatt stated at the end of the case, as he had to, that there was no 'evidence from which the jury could find that it (Nutrix materials) would in fact appeal to the prurient interest of a particular class.'

"Furthermore, nothing in the record shows that the material even has prurient appeal to the average man.

"...In this case, however, the only predicate for any conclusion about prurient appeal was the material

itself, as if *res ipsa loquitur*. The jurors were, therefore, left to speculate. They were invited to behold the accused material and, in effect, conclude simply that it is undesirable, it is distasteful, it is disgusting. Knowing perhaps that they would not be interested in obtaining more of the material they might wonder why anyone else would, and conclude that the only answer is 'prurient appeal.' "

Commonwealth v. Dell Publications, Inc., 233 A. 2d 840 (1967):

"In the instant litigation, however, both the comments made during the hearing and the formal adjudication indicate that the hearing judge proceeded on the premise that, in the final analysis, his own subjective reaction, and and by itself, was the determining factor. As the law of obscenity now stands the judge's subjective analysis is of course relevant to the ultimate issue, but the mere donning of judicial robes does not make us the embodiment of the 'average person' nor do our tastes necessarily parallel those of the 'contemporary community.'

"The totally subjective approach adopted by the court below was palpable error.

.....

"A. Appeal to Prurient Interest. This is perhaps the most difficult of the three elements to define. What appeals to the prurient interest of one individual may not appeal to the prurient interest of another. Some cases may pose a problem of group definition, but it is conceded that 'Candy's' appeal is to the community at large and thus we must judge its prurient appeal to the 'average person.'

"Unfortunately, there was practically no testimony offered concerning 'Candy's' appeal to the prurient interest of the average adult citizen.

"The Commonwealth presented practically no evidence whatsoever concerning 'Candy's' relationship to contemporary community standards."

Dunn v. Maryland State Board of Censors, 213 A.2d 751 (1965):

"In the present instance the Board did no more than offer the film; it produced no other evidence whatever. We think it plain that save in the rare case where there could be no doubt that the film is obscene the Board will not meet the burden of persuasion imposed on it by the Constitution and the statute without offering testimony that the picture is obscene in that (a) the average person, applying community standards, would find that its dominant theme, taken as a whole, appeals to prurient interests, (b) that the film goes substantially beyond customary limits of candor in description or representation of sex or other matters dealt with, and (c) that it is subject to proscription because it is utterly without redeeming social importance considered in light of the fact that '... sex and obscenity are not synonymous, *Roth*, U.S. 476, 487, 77 S.Ct. 1304, 1310, 1 L.Ed.2d 1498, 1508, and the fact that material dealing with sex in a manner that advocates ideas or has literary, scientific or artistic value or any other form of social importance may not be branded as obscenity. In our view, neither the judge who may sit in the circuit court to review the action of the Board nor the judges of this Court ordinarily would be qualified to determine whether a film exceeded these constitutional standards or tests without enlightening testimony on these points."

Hudson v. United States, 234 A.2d 903 (1967):

"Where the material involved is not patently obscene, neither a judge nor twelve local jurors chosen at random are capable of determining the standards of tolerance prevalent in the nation generally without first being given some competent evidence of what those standards are. *United States v. Klaw*, 350 F.2d 155, 168 n. 14 (2d Cir. 1965). A guilty verdict is an obscenity trial should not be a legal expression of revulsion by the local community from which the jury is drawn. If a case is submitted to the trier of fact without first establishing the community standards by competent evidence to which the trier may refer, the verdict at best will be based on the prevailing customs in a limited geographical area and, at worse, upon the 'subjective reflection of taste or oral outlook of individual jurors or individual judges. . . .' [T]he determination of obscenity is for juror or judge, not on the basis of his personal upbringing or restricted reflection or the particular experience of life, but on the basis of 'contemporary community standards.' *Smith v. People of State of California*, 361 U.S. 147, 165, 80 S.Ct. 215, 225, 4 L.Ed.2d 205 (1959), concurring opinion of Mr. Justice Frankfurter. These standards must be established by relevant evidence at trial.

"Since the prosecution in the present case had the burden of proving relevant community standards prevailing in the nation generally and elected not to do so, we hold that the Government failed to establish an essential element of the crime charged and the verdicts of guilty were therefore in error."

See also *Ramirez v. State*, 430 P.2d 826 (1967), and *City of Phoenix v. Fine*, 420 P.2d 26 (1966).

"...[W]e reverse on the ground that the state has failed on any conceivable basis to prove its case. Here, as will be recalled, the only evidentiary predicate for the conclusion that the publications are obscene under any of the views expressed in *Redrup* are the publications themselves. Apparently, the prosecution believes that a theory [sic] akin to *res ipsa loquitur* applies to obscenity cases, and that no evidence other than the presentation of the magazines is required in order to establish a violation of the statutory and constitutional standards."

And recently in the Court of Special Appeals of Maryland in the matter styled *Woodruff v. State*, 237 A.2d 436. His Honor, Judge Moylan appropriately stated:

"In measuring then the prurient appeal of this theme, we must do so in terms of a particular audience. *There was no evidence in this case to indicate that, under Mishkin, it was 'designed for or primarily disseminated to a clearly-defined deviant sexual group.'* We must, therefore, measure prurience in terms of its appearance to the average person. (Emphasis added.)

.....

"It is axiomatic that to judge whether something offends contemporary community standards, one must know what those contemporary community standards are. In this case, the State neither showed nor offered any evidence whatsoever as to the standards prevailing in Prince George's County, the State of Maryland or the United States, whichever of those communities will ultimately be deemed the appropriate 'community.' *Jacobellis v. Ohio*, *supra*. By way of defense, the appellant did, make two

abortive attempts to offer testimony as to the prevailing community standards, at least within Prince George's County.

.....

"This failure of the trial court to afford the appellant an opportunity to prove what he believed to be the prevailing community standard is not material, however, in view of our belief that the State failed utterly to make even a *prima facie* showing of any community standard whatsoever. We feel, as did Judge Orth in his concurring opinion in *Dillingham v. State*, *supra*, 9 Md. App. at 715, 267 A.2d at 801:

'I cannot determine from the record whether or not the material affronts contemporary community standards relating to the description or representation of sexual matters. The State, as the opinion of the Courts points out, did not prove what the contemporary community standards are, either national or local.... It is not possible to determine that the material here affronted contemporary community standards when the standards themselves are not delineated. Thus, the second element was not proved and this alone would be good reason to reverse the conviction.'

.....

"In making our own independent, reflective judgment upon the material, we feel that the view expressed by Judge (now Chief Judge) Hammond in *Dunn v. Maryland State Board of Censors*, *supra*, 240 Md. at 255, 213 A.2d at 754, even though dealing with alleged obscenity in the context of motion picture censorship, is pertinent:

'In our view, neither the judge who may sit in the circuit court to review the action of the Board nor the judges of this Court ordinarily would be qualified to determine whether a film exceeded those constitutional standards or tests without enlightening testimony on these points.'

"Even were the material before us obscene by any test, however, the conviction of the appellant here would have to be reversed because of the utter failure of the State to show any evidence of *scienter* on his part as required by *Smith v. California*."

In the recent case of *United States v. Groner*, No. 71-1091, CA-5, decided January 11, 1972, the Fifth Circuit Court of Appeals reversed a conviction for using a common carrier in interstate commerce to transport a quantity of obscene books in violation of 18 U.S.C. §1462:

"There remains little doubt that this Court is obligated to make an independent evaluation on the issue of whether the material in question is obscene. The issue of obscenity involves the application of first amendment rights to the printed word. The courts, not the reasonable jury or even the majority of reasonable men, are responsible for the protection of freedom of speech. The substantial evidence test, usually employed to reinforce jury verdicts, thus cannot be utilized to apply these constitutional doctrines.

"We have little trouble in finding the books involved in the instant case to be vile, filthy, disgusting, vulgar, and, on the whole, quite uninteresting. We do, however, have difficulty in equating these adjectives with the constitutional definition of obscenity.

"Knowing the legal test for obscenity and applying the same in light of recent Supreme Court decisions, however, are two entirely different matters. We are completely incapable of applying the test in the instant case. Without some guidance, from experts or otherwise, we find ourselves unable to apply the *Roth* standard with anything more definite or objective than our own personal standards of prudence and decency, standards which should not and cannot serve as a basis for either denying or granting first amendment protection to this or any other literature.

"Jurors in an obscenity case are called upon to determine contemporary community standards and must then compare the materials in question to determine whether they go 'substantially beyond the limits of candor' in describing sex or nudity. Each juror is an individual—separate in his morals, experience and taste. The only standards which govern his conduct and his judgment are his own, not those of the community as a whole, whether state-wide or national. Although such unfettered discretion is acceptable in determining questions of negligence, probable cause and intent, it has no place in determining whether material is to be armed with first amendment protection. We can come to no other conclusion under the circumstances.

"This Court finds itself in the same position as that of the jury in such a case. We cannot take judicial notice, without even a scintilla of evidence, of what constitutes the community standard of decency at this or any other time. If such a standard exists at all, we would expect that it would be in a constant evolutionary and even revolutionary flux, the fact of which militates against our exercising uninformed judgment at any particular point in time. At best it would be a matter of pure chance as to whether we

as a Court, or an individual's left to our own devices and without the aid of evidence, could determine the correct standard.

"Moreover, we think evidence of the materials' prurient appeal was necessary. The material in the instant case does not appeal to the prurient interests of this Court. Indeed, we have trouble imagining its appealing to the prurient interests of any normal, same, healthy individual. It is just too disgusting and revolting to be so classified. *To allow a case to go to a jury of layman under such circumstances is to invite the jurors' equating patent offensiveness with prurient appeal and aiding suppression simply on the basis of speculation and suspicion about the prurient appeal of material to some known, undefined person whose psyche is not known. The possibility, even the probability, that jurors would be uncommonly sanctimonious or Puritanical in such a state of affairs should be obvious to anyone who has noted the numerous defeats of jury censors at the hands of the appellate courts.*

"We wish to make it perfectly clear what we hold, and what we fail to hold today in the instant case. We have expressed no opinion on the issue of whether the material involved here is or is not obscene. *In fact, our inability to do so is the basis for our holding that expert testimony is required on the elements of obscenity in order to furnish juries and this Court with an objective basis for deciding on the issue of first amendment rights.*" *United States v. Groner, supra*, (Slip Opinion).

No evidence was produced by the State of Georgia through any competent witness as to the prurient interest appeal of the motion picture film. Similarly there was no evidence reflecting upon the prevailing community standards.

The State did not produce any evidence as to whether the Motion Picture Films did not contain any redeeming social value. And there was no evidence that the Motion Picture Films exceeded the prevailing community standards.

It is not incumbent upon the citizen, in securing those freedoms guaranteed to him by virtue of the *First and Fifth Amendments to the Constitution of the United States*, to affirmatively show that the materials constitute protected expression. But the burden is upon them who seek to suppress the presumptively protected materials to affirmatively show by sufficient competent evidence that the materials are not protected by the *Constitution of the United States* before the materials can be suppressed, seized, and destroyed.

To find Motion Picture Films obscene on such an utter lack of affirmative evidence constitutes a denial of Due Process secured to Petitioners by virtue of the *First, Fifth and Fourteen Amendments to the Constitution of the United States*. It is respectfully represented that the State of Georgia has utterly failed to present even a *prima facie* case of obscenity.

3. THE STATE OF GEORGIA MAY NOT, CONSISTENT WITH THE *FIRST, FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES*, UTILIZE *AD HOC* PROCEDURES TO ENJOIN DISSEMINATION OF PRESUMPTIVELY PROTECTED FIRST AMENDMENT MATERIALS WHERE THERE IS NO STATUTORY PROCEDURE OR AUTHORITATIVE JUDICIAL DECISION

AUTHORIZING THE SAME WITH APPROPRIATE PROVISIONAL SAFEGUARDS.

In many of the cases cited herein for support of the position of the Appellants that procedural Due Process within the area of *First Amendment freedoms* requires a constitutionally valid statutory procedure, the United States Supreme Court did, in fact, strike down statutory schemes and procedures which were, as the Court stated, "infected with the statutory vice of vagueness or impermissible overbreadth." The language of the High Court in those cases reiterates time and time again that special rigid procedural Due Process safeguards must be employed and those special rigid procedural Due Process safeguards must ensure that there will be no curtailment "of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line."

Mr. Justice Frankfurter has once said, "The history of American Freedom is, in no small measure, the history of procedure." *Malinski v. New York*, 324 U.S. 401, 414 (1945).

Although this was said in the context of criminal procedure, the views expressed were reaffirmed and elaborated on in *Speiser v. Randall*, *supra*. when Mr. Justice Brennan for the Court wrote as follows:

"When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied. *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, 441,

442, 1 L. Ed. 2d 1469, 1473, 1474, 77 S. Ct. 1325; *Near v. Minnesota*, 283 U.S. 697, 75 L. Ed. 1357, 51 S. Ct. 625; *cf. Cantwell v. Connecticut*, 310 U.S. 296, 305, 84 L. Ed. 1213, 1218, 60 S. Ct. 900, 128 LAR 1352; *Joseph Burstyne, Inc. v. Wilson*, 343 U.S. 495, 96 L. Ed. 1098, 72 S. Ct. 777; *Winters v. New York*, 333 U.S. 507, 92 L. Ed. 840, 68 S. Ct. 665; *Niemotko v. Maryland*, 340 U.S. 268, 95 L. Ed. 267, 71 S. Ct. 325, 328; *Staub v. Baxley*, 355 U.S. 313, 2 L. Ed. 2d 302, 78 S. Ct. 277.

"To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights. Cf. *Powell v. Alabama*, 287 U.S. 45, 71, 77 L. Ed. 158, 171, 53 S. Ct. 55, 84 ALR 527. When the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights—rights which we value most highly and which are essential to the workings of a free society. Moreover, since only considerations of the greatest urgency can justify restrictions on speech, and since the validity of a restraint on speech in each case depends on careful analysis of the particular circumstances, cf. *Dennis v. United States*, 341 U.S. 494, 95 L. Ed. 1137, 71 S. Ct. 857, and *Whitney v. California*, 274 U.S. 357, 71 L. Ed. 1095, 47 S. Ct. 641, both *supra*, the procedures by which the facts of the case are

adjudicated are of special importance and the validity of the restraint may turn on the safeguards which they afford . . ." (Emphasis added.)

In 1962, three (3) justices of the Court stated in the case of *Manual Enterprises Inc. v. Day*, 370 U.S. 478, 518-519(1962) in the plurality opinion by Mr. Justice Brennan as follows:

"[We have] . . . no doubt that Congress could constitutionally authorize a non-criminal process in the nature of a judicial proceeding under *closely defined* procedural safeguards." (Emphasis added.)

Over and over again, the High Court speaks of *specified* or *closely defined* procedural safeguards within the context of those special circumstances or procedural Due Process constitutionally required within the exercise of *First Amendment* rights.

On September 8, 1969, a statutory Three-Judge Court sitting in the United States District Court for the Northern District of Georgia, in a case styled, *United States of America, et al. v. The Book Bin*, 306 F. Supp. 1023, in an opinion written by Judge Edenfield, held unconstitutional a statutory scheme for allowing the Postmaster General to act to curb the flow of allegedly obscene materials through the mails. 39 U.S.C. § 4006 and 4007. Affirmed, United States, Supreme Court, 400 U.S. 410 (1971).

The chief contentions made by this counsel for the Book Bin, in Civil Action No. 12812, included the questions of the adequacy of the purported procedural safeguards in the statutory scheme to assure the protection of the exercise of *First Amendment* freedoms, and the adequacy of a procedure

which permitted a judicially imposed prior restraint upon

"a showing of probable cause to believe the statute is being violated... pending the conclusion of the statutory proceedings and any appeal therefrom."

The Three-Judge Court in striking down 39 U.S.C. §4006 and §4007, made the following comments which are deemed to the proceedings at bar.

"Second, the procedures established in Sections 4006 and 4007 do not pass constitutional muster under the tests established by the Supreme Court of the United States. *Freedman v. Maryland*, *supra* ... To avoid *First Amendment* problems, the Court required that the procedures impose the burden of proof on the censor to show obscenity, permit restraint prior to judicial review only to preserve the status quo, limit the restraint to the shortest period compatible with sound judicial administration, and assure prompt and complete judicial review. The procedures established under Sections 4006, 4007, fall short of meeting these rigid requirements... the Court must issue a restraining order merely upon a showing of 'probable cause'... it is doubtful if the limited judicial finding implicit in the grant of a Section 4007 finding insulates the procedure from constitutional infirmity, since the Court issues its order merely on a finding of probable cause, not an actual determination of obscenity. Thus, the statutory scheme effectively operates as a prior restraining... While prior restraints are not *per se* indefensible, they bear a heavy presumption of invalidity... This presumptive invalidity is not overcome in the instant case by carefully drawn safeguards. Contrast *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957). The

administrative procedures established by regulation under Section 4006, sec. 39 C.F.R. Sections 952.1-952.33, do not provide the procedural safeguards envisioned by *Freedman* and succeeding Supreme Court cases... The application of the Postmaster General here for an injunction under Section 4007 does not correct this constitutional flaw in the instant statutory network. As noted, Section 4007 does not permit a full judicial finding on obscenity, but restricts a court to a finding of probable cause."

It would appear that many of the issues disposed of in *The Book Bin* case would apply with equal validity in the context of the case at bar, except that in the case at bar we are not dealing with any type of statutory scheme with built-in safeguards providing for any type of statutory procedural safeguards to assure nonobscene publications and materials the protections which are afforded under the *First Amendment*.

No procedural safeguards exist that assure (a) the time period within which an adversary hearing must be held after an injunction issues; (b) present proceedings may not contemplate any final judicial determination of obscenity, yet the injunction continues in force for an unspecified period of time; and (c) within what specified time period must final judicial review be concluded. In *s. United States v. The Book Bin*, supra, the Court said:

"In *Freedman* itself, a delay of four months in securing initial judicial determination and six months in obtaining final appellate review was condemned."

In 1971, the Supreme Court, in a rarely seen unanimous opinion by eight (8) Justices, and Justice Black concurring, affirmed the judgment of both *United States v. The Book Bin* (D.C. N.D. Georgia) and *Blount, Postmaster General v. Ritzi, d/b/a The Mail Box* (D.C.C.D. California) 400 U.S. 410 (1971). The Court, speaking through Mr. Justice Brennan in the eleven (11)-page opinion, stated the case for specified statutory procedural due process safeguards within the area of the exercise of *First Amendment* freedoms as follows:

"... [T]he finding under §4007 merely of 'probable cause' to believe material was obscene was not a constitutionally sufficient standard to support a temporary mail detention order. 306 F. Supp. 1023 (1969)... those procedures violated the *First Amendment* unless they include built-in safeguards against curtailment of constitutionally protected expression, for Government 'is not free to adopt whatever procedures it pleases for dealing with obscenity... without regard to the possible consequences for constitutionally protected speech.' *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961). Rather, the *First Amendment* required that procedures be incorporated which 'ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line... Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards... is... but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks...' *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963). Since we have recognized that 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated... is finely drawn,... [T]he separation of legitimate from

illegitimate speech calls for... sensitive tools....'
Speiser v. Randall, 357 U.S. 513, 525 (1958).

"... [I]t is for Congress, not this Court, to rewrite the statute... That section does not provide a prompt proceeding for a judicial adjudication of the challenged obscenity of the magazine... We agree with the three-judge court in *Book Bin* that to satisfy the demand of the *First Amendment* 'it is vital that prompt judicial review' on the issue of obscenity—rather than merely probable cause—be assured on the Government's initiative before the severe restrictions in §4006, 4007 are invoked.' 306 F. Supp. at 1028.

"Thus the statute not only fails to provide that the district court should make a final judicial determination of the question of obscenity, expressly giving that authority to the judicial officer, but it fails to provide that '[A]ny restraint imposed in advance of a final judicial determination on the merits must... be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution.' 380 U.S. at 59... 'will have a severe restriction on the exercise of (appellees') *First Amendment* rights—all without a final judicial determination of obscenity.' 306 F. Supp. at 1028."

Thus the Supreme Court, by virtue of its recent pronouncement dealing with the constitutional requirement of a statutory scheme to assure procedural Due Process safeguards within the area relating to the exercise of *First Amendment* freedoms, clearly invalidates the *ad hoc* proceedings sought to be employed by counsel for the State of Georgia.

It can be anticipated that counsel for the State will argue that the permanent injunction obtained by the State is necessary to prevent the commission of crimes; i.e., Georgia Code §26.2101. The Supreme Court has heretofore rejected this claimed rationale to support a prior restraint, as follows in *Carroll v. President and Commissioners of Princess Anne County*, 393 US 175 (1968).

"Ordinarily, the State's constitutionally permissible interests are adequately served by criminal penalties imposed after freedom to speak has been so grossly abused that its immunity is breached. The impact and consequences of subsequent punishment for such abuse are materially different from those of prior restraint. Prior restraint upon speech suppresses the precise freedom which the *First Amendment* sought to protect against abridgment." *Supra* at pages 180-181.

Certainly, under the procedural Due Process decisions of the Supreme Court, the *ad hoc* procedure sought to be invoked by counsel for the State is clearly constitutionally deficient and repugnant to the *First, Fourth, and Fifth and Fourteenth Amendments to the Constitution of the United States* within the context of the exercise of *First Amendment* freedoms.

CONCLUSION

The Trial Court found the motion picture films involved herein not obscene on the basis of the evidence and the law. The Georgia Supreme Court, unguided by evidence on the elements of obscenity, found the motion picture films obscene. The motion picture films are of the type involved in

other cases before this Court found not obscene in the constitutional sense and accorded the *Redrup* treatment.

For the reasons set forth in the Petition herein, it is respectfully urged that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served upon opposing counsel the within and foregoing Petition for A Writ of Certiorari To The Supreme Court of Georgia by mailing two (2) copies thereof, postage prepaid, to:

Thomas E. Moran, Esquire
Suite 820, Northside Tower
6065 Roswell Road, N.E.
Sandy Springs, Georgia, 30328

Thomas R. Moran, Esquire
160 Pryor Street, S.W.
Civil-Criminal Court Building
Atlanta, Georgia, 30303

Hinson McAuliffe, Esquire
160 Pryor Street, S.W.
Civil-Criminal Building
Atlanta, Georgia, 30303

This day of FEBRUARY, 1972.

ROBERT EUGENE SMITH,
Esquire

APPENDIX A

**IN THE SUPERIOR COURT FOR THE
COUNTY OF FULTON
STATE OF GEORGIA****Civil Action No. B-61298****LEWIS R. SLATON,
as District Attorney,
Atlanta Judicial Circuit, and
HINSON McAULIFFE,
as Solicitor General of the
Criminal Court of Fulton County,
Plaintiffs,****v.****PARIS ADULT THEATRE I,
ROBERT MITCHEM,
PHILLIP A. FISHMAN, CLIFF TERRY,
FRED PRICHARD, and
JOE BALLEW,
Defendants.**

Civil Action No. B-61299

LEWIS R. SLATON,
as District Attorney,
Atlanta Judicial Circuit, and
HINSON MC AULIFFE,
as Solicitor General of the
Criminal Court of Fulton County,
Plaintiffs,

v.

PARIS ADULT THEATRE II,
ROBERT MITCHEM, PHILLIP A. FISHMAN,
CLIFF TERRY, FRED PRICHARD, and
JOE BALLEW,
Defendants.

ORDER

The State contends that the motion pictures under review in the above actions are obscene. The titles of the films are "It All Comes Out in the End" and "Magic Mirror."

Assuming that obscenity is established by a finding that the actors cavorted about in the nude indiscriminately, then these films may fairly be considered obscene. Both films are clearly designed to entertain the spectator and perhaps, depending on the viewer, to appeal to his or her prurient interest. The portrayal of the sex act is undertaken; but the act itself is consistently only a simulated one if, indeed, the viewer can assume an act of intercourse or of fellatio is occurring from the machinations which are portrayed on the screen. Each of the films is childish, unimaginative, and altogether boring in its sameness.

It appears to the Court that the display of these films in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible.

IT IS THE JUDGMENT OF THIS COURT THAT the films, even though they display the human body and the human personality in a most degrading fashion, are not obscene.

The actions against the Defendants, therefore, are dismissed.

This 12th day of April, 1971.

/s/ Jack Etheridge
Judge, Superior Court of
Fulton, County, Atlanta
Judicial Circuit.

APPENDIX B**IN THE SUPREME COURT OF
THE STATE OF GEORGIA****Case No. 26631****LEWIS R. SLATON,
As District Attorney, et al****Appellants****v.****PARIS ADULT THEATER I, et al
Appellees.****LEWIS R. SLATON,
As District Attorney, et al****Appellants****v.****PARIS ADULT THEATER II, et al
Appellees.****Decided: NOV-5, 1971****In the Supreme Court of Georgia****26631 SLATON, District Attorney, Et Al v.
PARIS ADULT THEATER I, Et Al**

1. Where, in a proceeding by the district attorney to have certain motion picture films declared to be obscene and subject to be seized and seeking temporarily and permanently to enjoin the showing of the same, the matter came on for a hearing pursuant to an ex-parte order requiring the defendants to show cause on a day certain 10 days from the issuance of such order why the

relief prayed for should not be granted and why a temporary injunction should not issue, it was error for the trial judge on such hearing to finally adjudicate the merits of the case and to dismiss the plaintiff's complaint.

2. The evidence was sufficient to authorize a jury to find that the films involved in this case are obscene. Upon such a finding, their exhibition in a commercial theater to willing adult audiences may be properly enjoined since it is not protected by the first amendment.
3. The denial of a temporary injunction in this case exposed the plaintiff to the hazard that the question sought to be adjudicated might become moot, and, under the principle of the balancing of conveniences, it was error to deny a temporary injunction restraining the exhibition of the films.

HAWES, Justice. The appeal in this case is from the judgment and order of the Superior Court of Fulton County refusing a temporary injunction against the showing by the defendants, Paris Adult Theater No. 1 and Paris Adult Theater No. 2, of two allegedly obscene motion pictures. Following the procedure approved by this court in *Evans Theater Corp. v. Slaton*, 227 Ga. 377 (180 SE2d 712), and followed in *Watler, et al. v. slaton*, 227 Ga. 676 (182 SE2d 464), and in *1024 Peachtree Corp., et al., v. Slaton* [No. 26612; decided

] *Lewis R. Slaton*, as District Attorney of the Atlanta Judicial Circuit, and *Hinson McAuliffe*, as Solicitor General of the Criminal Court of Fulton County, filed a complaint against the theaters and named individuals praying for a rule nisi to require the defendants to show cause on a date certain why motion picture films, "It All Comes Out in the End." and "Magic Mirror," should not be declared obscene and subject to be seized, and seeking in each case an order requiring the defendants to produce the aforesaid motion picture films and that they be temporarily and permanently enjoined from exhibiting the same. The rule nisi was duly

issued and served in each case, and an adversary hearing was held pursuant thereto on January 13, 1971 before a Judge of the Superior Court of Fulton County. The parties agreed to waive a jury trial and a preliminary hearing and stipulated that the judgment and order entered by the trial judge would be a final judgment and order in each case. After viewing the motion pictures and hearing the evidence, the trial judge rendered the following judgment. "The State contends that the motion pictures under review in the above actions are obscene. The titles of the films are, "It All Comes Out in the End," and "Magic Mirror." Assuming that obscenity is established by a finding that the actors cavorted about in the nude indiscriminately, then these films may fairly be considered obscene. Both films are clearly designed to entertain the spectator and perhaps, depending on the viewer, to appeal to his or her prurient interest. The portrayal of the sex act is undertaken; but the act itself is consistently only a simulated one if, indeed, the viewer can assume an act of intercourse or of fellatio is occurring from the machinations which are portrayed on the screen. Each of the films is childish, unimaginative, and altogether boring in its sameness.

"It appears to the Court that the display of these films in a commercial theater, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible.

"IT IS THE JUDGMENT OF THIS COURT THAT the films, even though they display the human body and the human personality in a most degrading fashion, are not obscene.

"The actions against the Defendants, therefore, are dismissed.

"This 12th day of April, 1971.

Jack Etheridge, Judge, Superior
Court of Fulton County, Atlanta
Judicial Circuit."

The appeal is from this order. The grounds of enumerated error are that the court erred in declaring each of the films to be not obscene, in refusing to enjoin the defendant from exhibiting each of said motion pictures, and in dismissing the appellant's complaint against the defendants.

Appellees contend, and the judge of the superior court found that, inasmuch as the evidence in this case shows that the films which the solicitor seeks to seize are shown in a theater which carries on the front thereof the warning that it is for adults only and that "You must be 21 and able to prove it. If viewing the nude body offends you - PLEASE DO NOT ENTER," the exhibition of the films in this context is permissible and that the State cannot, without violating first amendment rights, constitutionally prohibit it. They rely in support of this position upon the case of *Stanley v. Ga.*, 394 U.S. 557, and other Federal and State cases following it. That case, however, is not authority for the position which appellees take. It dealt, not with the commercial distribution of pornography, but with the right of Stanley to possess, in the privacy of his home, pornographic films. In one of the most recent, if not *the* most recent, case decided by the Supreme Court of the United States dealing with this kind of material that court has expressly limited the scope of Stanley and has thereby effectively answered this contention of the appellees. *U.S. v. Reidel*, *U.S.*, 28 L.Ed.2d 813, 91 S.Ct. . That case involved the distribution through the mails of an admittedly obscene publication in violation of 18 U.S.C. § 1461. The material was mailed to recipients who responded to a newspaper advertisement which required the recipient to state in his order therefor that he was 21 years of age. Reidel was indicted, but the trial court granted his motion to dismiss the indictment and, upon review, the

Supreme Court, in reversing that judgment, reiterated the ruling in *Roth v. U.S.*, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304, that "obscenity is not within the area of constitutionally protected speech or press." In so ruling, the Supreme Court expressly held that the government could constitutionally prohibit the distribution of obscene materials through the mails, even though the distribution be limited to willing recipients who state that they are adults, and, further, that the constitutional right of a person to possess obscene material in the privacy of his own home, as expressed in *Stanley*, does not carry with it the right to sell and deliver such material. As we view the holding in the *Reidel* case, it is dispositive of the appellees' contention, and the ruling of the trial court that the showing of these films in a commercial theater under the circumstances shown in this case is constitutionally permissible. The defendants in this case were making sales and delivery of the films involved in the only practical way in which it could be done, that is, by selling to the public the right to come into their theater and view the showing of such films. No reason exists why the sale and delivery of these films should be immune to State control any more than the sale and delivery of multiple copies of an obscene book, pamphlet or magazine. Those who choose to pass through the front door of the defendant's theater and purchase a ticket to view the films and who certify thereby that they are more than 21 years of age are willing recipients of the material in the same legal sense as were those in the *Reidel* case, who, after reading the newspaper advertisements of the material, mailed an order to the defendant accepting his solicitation to sell them the obscene booklet involved there. That case clearly establishes once and for all that the sale and delivery of obscene material to willing adults is not protected under the first amendment.

Appellee also contends, and the trial judge so found, that the sexual activity depicted in these films is merely simulated, and that, being such, it is not obscene. This contention we unhesitatingly and utterly reject. True, the activity in the

films here involved is not not revealed in the explicit detail embodied in the films in the Walter case. But, we held in the Evans Theater case that, "I Am Curious Yellow," depicted hard core pornography. In that case, only simulated sexual activity was involved. The films in this case leave little to the imagination. It is plain what they purport to depict, that is, conduct of the most salacious character. We hold that these films are also hard core pornography, and the showing of such films should have been enjoined since their exhibition is not protected by the first amendment.

Judgment reversed. All the Justices concur.

Case No. 26631

**PARIS ADULT THEATER I, et al
Appellees**

PARIS ADULT THEATER II, et al Appellees

Decided: Nov. 5, 1971

26631 SLATON, District Attorney, Et Al.
v.
PARIS ADULT THEATER I, Et Al.

The films involved in this case are hard core pornography.

Their commercial exhibition is not protected by the first amendment, and the trial court erred in refusing to enjoin their exhibition in a theater where all adult persons willing to pay the price were admitted.

HAWES, Justice. The appeal in this case is from the judgment and order of the Superior Court of Fulton County refusing a temporary injunction against the showing by the defendants, Paris Adult Theater No. 1 and Paris Adult Theater No. 2, of two allegedly obscene motion pictures. Following the procedure approved by this court in *Evans Theater Corp. v. Slaton*, 227 Ga. 377 (180 SE2d 712), and followed in *Walter, et al v. Slaton*, 227 Ga. 676 (182 SE2d 464), and in *1024 Peachtree Corp., et al. v. Slaton*, [No. 26612; decided

J. Lewis R. Slaton, as District Attorney of the Atlanta Judicial Circuit, and Hinson McAuliffe, as Solicitor General of the Criminal Court of Fulton County, filed a complaint against the theaters and named individuals praying for a rule nisi to require the defendants to show cause on a date certain why the motion picture films, "It All Comes Out in the End," and "Magic Mirror," should not be declared obscene and subject to be seized, and seeking in each case an order requiring the defendants to produce the aforesaid motion picture films and that they be temporarily and permanently enjoined from exhibiting the same. The rule nisi was duly issued and served in each case, and an adversary hearing was held pursuant thereto on January 13, 1971 before a Judge of the Superior Court of Fulton County. After viewing the motion pictures and hearing the evidence, the trial judge rendered the following judgment: "The State contends that the motion picture under review in the above actions are obscene. The titles of the films are, "It All Comes Out in the End," and "Magic Mirror." Assuming that obscenity is established by a finding that the actors cavorted about in the nude indiscriminately, then these films may fairly be considered obscene. Both films are clearly designed to entertain the spectator and perhaps, depending on the viewer, to appeal to his or her prurient interest. The portrayal of the sex act is undertaken; but the act itself is consistently only a simulated one if, indeed, the viewer can assume an act of intercourse or of fellatio is occurring from the machinations which are portrayed on the screen. Each of the films is childish, unimaginative, and altogether boring in its sameness.

"It appears to the Court that the display of these films in a commercial theater, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible.

"IT IS THE JUDGMENT OF THIS COURT THAT the films, even though they display the human body and the human personality in a most degrading fashion, are not obscene.

"The actions against the Defendants, therefore, are dismissed.

"This 12th day of April, 1971.

Jack Etheridge, Judge, Superior
Court of Fulton County, Atlanta
Judicial Circuit."

The appeal is from this order. The grounds of enumerated error are that the court erred in declaring each of the films to be not obscene, in refusing to enjoin the defendant from exhibiting each of said motion pictures, and in dismissing the appellant's complaint against the defendants.

1. As was pointed out in *Walter v. Slaton, supra*, the initial hearing in this kind of proceeding presents for the judge's decision only the question of whether there is probable cause to hold the material in question to be obscene, and, therefore, whether the exhibition of a motion picture or the distribution of literature shall be temporarily enjoined until the ultimate question of obscenity can be passed upon by a jury. Therefore, "on the hearing of an application for an interlocutory injunction, the presiding judge should not undertake to finally adjudicate issues of fact, but should pass on such questions only so far as to determine whether the evidence authorizes the grant or refusal of the interlocutory

relief." *Florida Central R. Co. v. Cherokee Sawmill Co.*, 137 Ga. 815 (6) (74 SE 523); *Kight v. Gilliard*, 214 Ga. 445 (2) (105 SE2d 333); *Smith v. Davis*, 222 Ga. 839, 841 (152 SE2d 870); *Oliver v. Forshee*, 224 Ga. 200, 202 (160 SE2d 828). In the instant case, a question of fact was presented as to whether applying contemporary community standards the dominant theme of the films in question, taken as a whole, is to the prurient interest, and whether they are entirely without redeeming social value. The films themselves were in evidence. They spoke for themselves, and we have reviewed them in the discharge of our function as a court of review, along with the transcript of the oral testimony adduced upon the hearing. Conceding that the testimony of the so-called expert witness who testified on the trial on behalf of the defendants as to the redeeming social value of the films, when considered in connection with the films themselves made an issue of fact as to whether the films are obscene, this was a question which, under our procedure, necessarily had to be submitted to the jury upon the final determination of the case, and under the cases last cited it was clearly error for the trial judge to pass an order dismissing the complaint. It cannot be said under the state of the record before this court that a finding in favor of the complainants could not under any conceivably provable circumstances be authorized.

2. Appellees contend, and the judge of the superior court found that, inasmuch as the evidence in this case shows that the films which the solicitor seeks to seize are shown in a theater which carries on the front thereof the warning that it is for adults only and that "You must be 21 and able to prove it. If viewing the nude body offends you — PLEASE DO NOT ENTER," the exhibition of the films in this context is permissible and that the State cannot, without violating first amendment rights, constitutionally prohibit it. They rely in support of this position upon the case of *Stanley v. Ga.*, 394 U.S. 557, and other Federal and State cases following it. That case, however, is not authority for the position which appellees take. It dealt, not with the commercial distribution

of pornography, but with the right of Stanley to possess, in the privacy of his home, pornographic films. In one of the most recent, if not *the* most recent, case decided by the Supreme Court of the United States dealing with this kind of material that court has expressly limited the scope of Stanley and has thereby effectively answered this contention of the appellees. *U.S. v. Reidel*, U.S. , 28 L.Ed.2d 813, 91 S.Ct. . That case involved the distribution through the mails of an admittedly obscene publication in violation of 18 U.S.C. § 1461. The material was mailed to recipients who responded to a newspaper advertisement which required the recipient to state in his order therefor that he was 21 years of age. Reidel was indicted but the trial court granted his motion to dismiss the indictment, and, upon review, the Supreme Court, in reversing that judgment, reiterated the ruling in *Roth v. U.S.*, 354 U.S. 476, 1 L.Ed 2d 1498, 77 S.Ct. 1304, that "obscenity is not within the area of constitutionally protected speech or press." In so ruling, the Supreme Court expressly held that the government could constitutionally prohibit the distribution of obscene materials through the mails, even though the distribution be limited to willing recipients who state that they are adults, and, further, that the constitutional right of a person to possess obscene material in the privacy of his own home, as expressed in Stanley, does not carry with it the right to sell and deliver such material. As we view the holding in the Reidel case, it is dispositive of the appellees' contention, and the ruling of the trial court that the showing of these films in a commercial theater under the circumstances shown in this case is constitutionally permissible. The defendants in this case were making sales and delivery of the films involved in the only practical way in which it could be done, that is, by selling to the public the right to come into their theater and view the showing of such films. No reason exists why the sale and delivery of these films should be immune to State control any more than the sale and delivery of multiple copies of an obscene book, pamphlet or magazine. Those who choose to pass through the front door of the defendant's theater and

purchase a ticket to view the films and who certify thereby that they are more than 21 years of age are willing recipients of the material in the same legal sense as were those in the Reidel case, who, after reading the newspaper advertisements of the material, mailed an order to the defendant accepting his solicitation to sell them the obscene booklet involved there. That case clearly establishes once and for all that the sale and delivery of obscene material to willing adults is not protected under the first amendment.

Appellee also contends, and the trial judge so found, that the sexual activity depicted in these films is merely simulated, and that, being such, it is not obscene. This contention we unhesitatingly and utterly reject. True, the activity in the films here involved is not revealed in the explicit detail embodied in the films in the Walter case. But, we held in the Evans Theater case that, "I Am Curious Yellow," depicted hard core pornography. In that case, only simulated sexual activity was involved. The films in this case leave little to the imagination. It is plain what they purport to depict, that is, conduct of the most salacious character. We held that these films may be found to be obscene, and upon such a finding the showing of such films should be enjoined since their exhibition is not protected by the first amendment.

3. Generally, in the granting or denying of a temporary injunction, a wide discretion is vested in the judge of the superior court, and unless some substantial equity has been violated, this court will not control his exercise of that discretion in passing such interlocutory order unless it is shown to have been clearly abused. *Jones v. Johnson*, 60 Ga. 260 (3); *Green v. Fuller*, 223 Ga. 204 (1) (154 SE2d 220); *Mar-Pak Michigan, Inc. v. Pointer*, 225 Ga. 307, 309 (168 SE2d 141); *J.D. Jewell, Inc. v. Hancock*, 226 Ga. 480, 488 (9) (175 SE2d 847). However, where it is clear from the language of the order appealed from that the trial judge did not deny the temporary injunction in the exercise of his discretion, but that his denial was based upon an erroneous

interpretation of the law, the foregoing rule does not apply. *Ballard v. Waites*, 194 Ga. 427, 429 (2) (21 SE2d 848), and *cits.* Accordingly, under such circumstances, in reviewing the denial of a temporary injunction, this court should consider whether upon the application of the principle of the balancing of conveniences the denial of a temporary injunction would leave the plaintiff practically remedyless in the event he should thereafter establish his right to a permanent injunction. *Everett v. Tabor*, 119 Ga. 128 (4), 130 (46 SE 72); *Maddox v. Willis*, 205 Ga. 596 (5) (54 SE2d 632); *Stephens v. State Highway Department*, 223 Ga. 713, 714 (1) (157 SE2d 751). Applying the foregoing propositions to the facts of this case, it is apparent that a temporary injunction was necessary in order to protect the jurisdiction of the court and to prevent the case from becoming moot. It follows that the trial judge erred in denying the temporary injunction.

Judgment reversed. All the Justices concur.

APPENDIX D**FIRST, FIFTH, SIXTH, AND FOURTEENTH
AMENDMENT, U.S.C.
and Georgia Code § 26-2101****FIRST AMENDMENT,
CONSTITUTION OF THE UNITED STATES**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**FIFTH AMENDMENT,
CONSTITUTION OF THE UNITED STATES**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**SIXTH AMENDMENT,
CONSTITUTION OF THE UNITED STATES**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

**FOURTEENTH AMENDMENT,
CONSTITUTION OF THE UNITED STATES**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

GEORGIA CODE § 26-2101

26-2101. Distributing obscene materials.—(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do: Provided, that the word “knowing” as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject-matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable

and prudent man on notice as to the suspect nature of the material.

(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(c) Material, not otherwise obscene, may be deemed obscene under this section if the distribution thereof, or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(d) A person convicted of distributing obscene material shall for the first offense be punished as for a misdemeanor, and for any subsequent offense shall be punished by imprisonment for not less than one nor more than five years, or by a fine not to exceed \$5,000, or both.

(Acts 1968, pp. 1249, 1302, 1971, p. 344.)

(Page 138, Criminal Code of Georgia.)

APPENDIX E

Clerk's Office, Supreme Court of Georgia

DEAR SIR:

ATLANTA

NOV 19 1971

~~Your briefs in the following have been received and filed, to wit:~~

Case No. 26631, Lewis R. Slaton, D.A., et al
v. Paris Adult Theatre I, et al

~~THE MOTION FOR REHEARING~~

~~WAS DENIED TODAY~~

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

FILE COPY

Supreme Court
FILED

MAY 30 1972

MICHAEL RODAX, JR.,

IN THE
Supreme Court of the United States

October Term, 1971

No. 71-1051

PARIS ADULT THEATRE I,
Petitioner,

v.

LEWIS R. SLATON, As District Attorney,
Atlanta Judicial Circuit, and
HINSON McAULIFFE, As Solicitor General of
the Criminal Court of Fulton County, Georgia,
Respondents.

PARIS ADULT THEATRE II,
Petitioner,

v.

LEWIS R. SLATON, As District Attorney,
Atlanta Judicial Circuit, and
HINSON McAULIFFE, As Solicitor General of
the Criminal Court of Fulton County, Georgia,
Respondents.

**BRIEF OF RESPONDENTS IN OPPOSITION
TO THE PETITION FOR WRIT OF CERTIORARI**

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IN THE
Supreme Court of the United States

October Term, 1971

No. 71-1051

PARIS ADULT THEATRE I,

Petitioner,

v.

LEWIS R. SLATON, As District Attorney,
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the Criminal Court of Fulton County, Georgia,

Respondents.

PARIS ADULT THEATRE II,

Petitioner,

v.

LEWIS R. SLATON, As District Attorney,
Atlanta Judicial Circuit, and
HINSON McAULIFFE, As Solicitor General of
the Criminal Court of Fulton County, Georgia,

Respondents.

**BRIEF OF RESPONDENTS IN OPPOSITION
TO THE PETITION FOR WRIT OF CERTIORARI**

Lewis R. Slaton, District Attorney, Atlanta Judicial Circuit, and Hinson McAuliffe, Solicitor General, Criminal Court of Fulton County, Respondents, pray that the Application for Writ of Certiorari to the Supreme

Court of Georgia to review the judgment entered in this case on November 18, 1971, be denied.

OPINION BELOW

The decision sought to be reviewed by this Court is reported at 228 Georgia 343 (1971); 185 S.E.2d 768. It is also set out as "Exhibit C" in Petitioner's Petition for Writ of Certiorari.

JURISDICTION

Respondents adopt Petitioner's jurisdictional statement.

QUESTIONS PRESENTED

1. Whether The Two (2) Motion Picture Films Which Are The Subject Matter Of These Proceedings, And Determined By The Supreme Court Of Georgia To Be Obscene, Are Obscene In The Constitutional Sense And Are Therefore Not Protected Expression Under The First Amendment Of The United States Constitution?
2. Does The Determination And Judgment Of The Georgia Supreme Court Finding Each Of The Films To Be Obscene And "Hard Core Pornography" Violate Petitioner's Rights To Procedural And Substantive Due Process Required By The Fifth And Fourteenth Amendments To The Constitution Of The United States?
3. Whether The Procedure Employed In The Adversary Hearing Was Proper And Consistent With First, Fourth, Fifth And Fourteenth Amendments To The Constitution Of The United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents adopt the constitutional and statutory provisions set forth in Appendix "D" of the Petition for Certiorari and, in addition thereto, add Georgia Code Section 26-2011, Public Indecency.

STATEMENT OF THE CASE

Respondents filed a Complaint in the Fulton Superior Court against Paris Adult Theatre I and Paris Adult Theatre II alleging that Defendants were exhibiting and showing to the general public for an admission charge a 16-millimeter motion picture film entitled "It All Comes Out In The End", in one theatre, and a 16-millimeter motion picture film entitled "Magic Mirror" in the other, each of which were alleged to be obscene within the definition of Georgia Code Section 26-2101 and its exhibition prohibited by that section.

In each of the cases Respondents demanded that a Rule Nisi issue and that after a hearing upon the question and issue of obscenity that each of the films be declared obscene and subject to seizure and that the Defendants be temporarily and permanently enjoined from exhibiting the said films within the jurisdiction of the Court. Respondents further prayed for a temporary injunction temporarily restraining and enjoining Defendants from concealing, destroying, altering or removing the motion picture films from the jurisdiction of this Court. A temporary injunction was granted by the Court, and the Defendants were further ordered to have one (1) print each of the films, as they were exhibited on the 28th day of December, 1970, in Court on the 13th day

of January, 1971, together with the proper equipment for viewing the same.

On the 13th day of January, 1971, the films were produced by Defendants after one (1) of the Defendants served had been held in contempt for refusing to furnish the films on the grounds to do so might incriminate him.

The parties stipulated and agreed to waive a jury trial and a preliminary hearing and stipulated that the judgment and order entered by the Trial Judge would be a Final Judgment and Order in each case.

The parties further stipulated that certain photographs, which were taken shortly before the hearing, correctly portrayed the outside of Paris Adult Theatre I and Paris Adult Theatre II, as they existed on December 28, 1970, with the exception of the titles therein exhibited.

Each of the films were exhibited to the Trial Court and to the Supreme Court of Georgia.

Evidence revealed that the theatres carried the legend on the outside that the films were for "Adults Only" and that "You Must Be 21 And Able To Prove It. If Viewing The Nude Body Offends You, Do Not Enter."

Ira W. Brown testified that he viewed the motion picture "It All Comes Out In The End" at the Paris Adult Theatre on December 28, 1970, and paid an admission charge of Three and No/100 (\$3.00) Dollars to enter the theatre.

Mr. Brown further testified that there was nothing on the outside that would indicate that acts of fellatio, cunnilingus or group sexual intercourse would be exhibited in that film.

Evidence further revealed that no legend or other type of warning was exhibited outside the theatre which would forewarn the general public as to the contents of the film entitled "Magic Mirror".

Mr. C. R. Little testified that he viewed the film "Magic Mirror" in its entirety on December 28, 1970, and that nothing was exhibited on the outside of the theatre that warned him what the contents of the film would be, other than the fact that adult movies were being shown in the theatre. There was nothing on the outside of the theatre that indicated or suggested that the acts of fellatio or cunnilingus or other erotica were contained in the films so exhibited.

At the conclusion of the evidence the Trial Court took under advisement Motions to Dismiss filed by Respondents and subsequently did sustain the said Motions and dismiss Respondents' Complaint. This judgment was reversed by the Supreme Court of Georgia on November 5, 1971, and petitions for rehearing were denied on November 18, 1971.

REASONS FOR NOT GRANTING THE WRIT

1. THE TWO (2) MOTION PICTURE FILMS WHICH ARE THE SUBJECT MATTER OF THESE PROCEEDINGS, AND DETERMINED BY THE SUPREME COURT OF GEORGIA TO BE OBSCENE, ARE OBSCENE IN THE CONSTITUTIONAL SENSE AND ARE THEREFORE NOT PROTECTED EXPRESSION UNDER THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

The photographs of the outside of Paris Adult Theatres I and II clearly established the total lack of forewarning to prevent potential intrusion into the privacy of

unsuspecting adults who wish to avoid confrontation with erotic material. The modest legend on the exterior of the premises simply provided that the material "Is For Adults Only And You Must Be 21 And Able To Prove It. If Viewing The Nude Body Offends You—Please Do Not Enter."

This legend would not forewarn the public, nor does it even suggest, that the films in question depicted fellatio, cunnilingus, sexual congress, lesbian activities or homosexuality. At most the legend would suggest that the films only portrayed and exhibited nude scenes and pictures, such as are contained in "girlie" magazines, which this Court has ruled are constitutionally permissible under the Doctrine of *Redrup v. New York*, 386 U.S. 767, as explained and construed in *Milky Way Productions, Inc. v. Leary*, 305 Fed. Supp. 288, 293, affirmed 90 S.Ct. 817.

In the Supreme Court of Georgia, Petitioners contended that because of the legend appearing outside the theatre, as hereinabove set forth, the exhibition of the films in this context is permissible; and that the State cannot, without violating First Amendment Rights, constitutionally prohibit it.

They relied in support of this position upon the case of *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, and other federal and state cases following it. *United States v. Reidel*, 402 U.S. 351, 91 S.Ct. 1410, expressly limited the scope of *Stanley* and discredited the decisions which would so expand it.

The myriad of cases relied upon and cited by Petitioners in regard to this point clearly involved interpretation of different statutes, "girlie" magazines and some motion picture films which are, in fact, borderline cases

at the most and the subject matter of which is no way comparable to the motion picture films involved in this case.

For an example, Petitioners cite and rely heavily upon *Burgin v. South Carolina*, 178 S.E. 2d 325, reversed 404 U.S. 806 (1971). The *Burgin* reversal was based upon *Redrup v. New York*. Counsel for the Petitioners in this case was also counsel for *Burgin*. On Page 12 of Petitioners' Petition for a Writ and Argument to this Court *Burgin* urged:

"It seems perfectly clear that this Court in offering a workable solution for the lower Courts in obscenity litigation, civil or criminal, in rem or in personam, has restricted the determination of obscenity vel non to *those materials depicting sexual activities.*" (Emphasis Added)

The evidence in *Burgin* consisted of several "girlie" magazines. *Burgin* stated on Page 11 of his Petition for Writ of Certiorari:

"These publications are indistinguishable from those involved in many of the decisions of the Supreme Court based upon the principles set forth in *Redrup v. New York*, 386 U.S. 767. Take, for example, the materials found not obscene for willing adults in *Bloss v. Dykema*, 389 U.S. 278, as recently as June 1, 1970. *In neither is there any depiction of sexual congress.*" (Emphasis Added)

The Petitions for Writs of Certiorari in *Burgin* and the other cases cited and relied upon by Petitioners in this case themselves distinguish clearly between the material involved in this case and the other cases relied upon.

"Magic Mirror" and "It All Comes Out In The End" depict sexual congress in every manner and method

known to man and are clearly and easily distinguishable from the material involved in *Burgin* or in any of the other cases which were reversed by this Court, per curiam, citing *Redrup* as authority.

In the case of *Wisconsin v. Amato*, 49 Wis. 2d 638; 183 N.W. 2d 29, certiorari denied January 24, 1972, 30 L.Ed. 2d 751, rehearing denied 31 L.Ed. 2d 257, the Supreme Court of Wisconsin held:

"In support of their contention that the three (3) magazines here involved are, as a matter of law, not obscene, Defendants describe the materials involved in several per curiam '*Redrup Reversals*.' While a few of these cases—notably *Central Magazine Sales Ltd. v. United States* (1967) 389 U.S. 50, 80 S.Ct. 235, 19 L.Ed. 2d 49—may have involved magazines bearing similarity to one of the magazines herein involved, the other cases dealt with books, films and other items bearing no resemblance to the instant materials."

The Court continued:

"The Appellants contend that the decision in *Redrup* modifies the use and scope of the *Roth-Memoirs Test*. They argue that magazines such as those involved in this case may not serve as a basis for obscenity prosecution unless it can be shown that: (1) They were sold to minors; or (2) They were so obtrusively displayed as to cause unwilling viewers to see them; or (3) They were pandered in the manner described in *Ginzburg*.

We do not agree. *Redrup* is authority only for the proposition that the particular books and magazines there involved were not obscene. We think that if the *Redrup* decision was intended to reverse the *Roth-Memoirs Test*, that obscenity is not constitutionally-protected speech, the Court would have so

stated in no uncertain terms. (Emphasis Added)
 ***We conclude that *Redrup* is strictly limited to the question of obscenity of the specific materials there under consideration."

The motion picture film itself is the highest and best evidence of what it contains. *U.S. v. Wild*, 422 Fed. 2d 34, 2d Circuit (1969). Rehearing denied February 2, 1970. Certiorari denied April, 1971, 9 Cr.L. 4046. In *Wild* the Court held that slides depicting nude male, seated or lying facing camera, holding or touching his erect penis, or depicting two (2) nude males in the act of fellatio constituted "hard core pornography".

This Court in the case of *United States v. Reidel*, 91 S.Ct. 1410, 1413, held:

"But *Roth* has squarely placed obscenity and its distribution outside the reach of the First Amendment, and they remain there today."

The Supreme Court of Georgia in its decision in this case, *Slaton v. Paris Adult Theatre*, 228 Ga. 343; 185 S.E. 2d 768, 769, held:

"As we view the holding in the *Reidel* case, it is dispositive of the Appellees' contention, and the ruling of the Trial Court that the showing of these films in a commercial theatre under the circumstances shown in this case is constitutionally permissible. The Defendants in this case were making sales and delivery of the films involved in the only practical way in which it could be done, that is, by selling to the public the right to come into their theatre and view the showing of such films. No reason exists why the sale and delivery of these films should be immune to State control any more than the sale and delivery of multiple copies of an obscene book, pamphlet or magazine. Those who choose to pass

through the front door of the Defendant's theatre and purchase a ticket to view the films and who certify thereby that they are more than twenty-one (21) years of age are willing recipients of the material in the same legal sense as were those in the *Reidel* case, who, after reading the newspaper advertisements of the material, mailed an order to the Defendant accepting his solicitation to sell them the obscene booklet involved there. That case clearly establishes once and for all that the sale and delivery of obscene material to willing adults is not protected under the First Amendment."

Georgia Code Annotated 26-2101 is held to be constitutional and within the purview of the First and Fourteenth Amendments to the United States Constitution. *Gable v. Jenkins*, 309 Fed. Supp. 998, affirmed 397 U.S. 592. The motion picture films here involved are clearly obscene in a constitutional sense, and they are not protected expression under the First and Fourteenth Amendments to the United States Constitution. Each of the said films offends every section of Georgia Code Section 26-2101. The Petition for a Writ of Certiorari to the Supreme Court of Georgia should be denied.

2. THE DETERMINATION AND JUDGMENT OF THE GEORGIA SUPREME COURT FINDING EACH OF THE FILMS TO BE OBSCENE AND "HARD CORE PORNOGRAPHY" DOES NOT VIOLATE PETITIONER'S RIGHTS TO PROCEDURAL AND SUBSTANTIVE DUE PROCESS REQUIRED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The Theatres objected to all efforts by the Respondents to introduce evidence of the Roth-Memoirs Tests of Ob-

scenity and should not be allowed to complain of the Trial Court's ruling.

However, the authoritative judicial decisions do not require such evidence in all cases.

The motion picture films themselves are the highest and best evidence of what they contain. *U.S. v. Wild*, 422 Fed. 2d 34; certiorari denied April, 1971, 9 Cr.L. 4046. In the case of *United States v. Robert Brown*, 328 Fed. Supp. 196, United States District Court, Eastern District of Virginia, Norfolk Division, decided June 9, 1971, the Court held at Page 199:

"The real issue in this case, of course, is whether these two (2) books are actually obscene. The Supreme Court has held, more than once, that obscenity is outside the scope of First Amendment protection." *** "Brown argues that this Court must acquit him because the government presented no expert testimony that the two (2) books are obscene. As authority for this position, Brown relies on *United States v. Klaw*, 350 Fed. 2d 155 (2d Cir. 1965), which does indicate some of the problems involved in determining questions of prurient interest and contemporary community standards. Specifically, the problems include 'how,' 'by whom,' and 'on what basis' these determinations are to be made. *Klaw*, however, is not controlling here, for as the Second Circuit Court of Appeals subsequently pointed out, the particular facts in *Klaw* required such testimony. *United States v. Wild*, 422 Fed. 2d 34 (2d Cir. 1969). The two (2) books named in this indictment appear to be substantially different from the materials discussed in *Klaw*.*** Judge Lumbard stated in *Wild*, 'The question of obscenity can be disposed of merely by stating that these slides are unquestionably hard core pornography. *** There is no conceivable claim that these color slides

have redeeming social value. *** Hard core pornography such as this can and does speak for itself.' 422 Fed. 2d at 35-36. And in *Ginzburg v. United States*, 383 U.S. 463, 465, 86 S.Ct. 942, 944, 16 L.Ed. 2d 31, the Court said that in the cases in which it has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question."

See also *New York v. Abronovitz*, 310 N.Y. Supp. 2d 698, and *New York v. Buckley*, 320 N.Y. Supp. 2d 91.

In *State v. Carlson*, 192 N.W. 2d 421 (1971), the Court held at Page 425:

"There is no need for expert assistance for a jury to determine contemporary community standards and whether the film lacks social value. The films speak for themselves as evidence of their obscenity. No amount of testimony by psychoanalysts, psychologists or anthropologists would be any more reliable on the question of whether the films affront contemporary community standards than the opinion of the jurors in this case."

The Court is obliged to make an independent constitutional judgment as to whether the material involved is Constitutionally protected. *Jacobellis v. Ohio*, 378 U.S. 184; 84 S.Ct. 1676.

In the case of *Evans Theatre Corporation, et al. v. Slaton*, 227 Ga. 377, certiorari denied November, 1971, the Court observed:

"In *Jacobellis v. Ohio*, 378 U.S. 184 (84 S.Ct. 1676, 12 L.Ed.2d 793), in an opinion concurred in by two (2) Justices of the United States Supreme Court, it was stated that the 'contemporary community standards' by which they must determine the issue of the Federal constitutional rights of

those convicted of crimes involving alleged obscene material were national standards. This opinion did not suggest that State courts must have evidence of national standards of decency before them in order to make a determination as to whether material is obscene. The United States Supreme Court in the *Jacobellis* case made its determination as to whether the film there reviewed was obscene under 'national' community standards by viewing the film itself."

Is Not The Supreme Court of Georgia Clothed With The Same Right, Authority And Responsibility To Make Such Determination By Viewing The Material Itself?

The *Evans* case involved the motion picture "I am Curious-Yellow". By an equally divided Court, this Court affirmed *Grove Press, Inc., et al v. Maryland State Board of Censors*, 401 U.S. 480, 91 S.Ct. 966, which decision declared the film "I am Curious-Yellow" obscene.

In *United States v. New Orleans Book Mart, Inc.*, 328 Fed. Supp. 136 (1971), at Page 142:

"It may be entertaining to satisfy a prurient interest in sex, but that does not constitute redeeming social value. Ultimately, 'redeeming social value' is not found solely on the face (if one can put it that way) of the photographs. It may arise from the use made of them. A photograph depicting actual sexual actions, conventional or unconventional in nature, might serve a useful purpose in the hands of a therapist. But it is implicit in the obscenity statutes that what is permitted for therapeutic use might be proscribed when put to some other purpose. *** Here the material is offered for sale to any adult buyer having the purchase price, not only to therapists and educators. The covers of the publications pander to the prospective purchaser. They are not offered to educate or to enlighten; they are intended to titillate."

In *Wisconsin v. Amato*, 49 Wis. 2d 638, certiorari denied January 24, 1972, 30 L.Ed.2d 751, rehearing denied 31 L.Ed.2d 257, also reported in 183 N.W 2d 29, the Court held on Page 32:

"The Appellants contend that in the absence of affirmative proof of 'contemporary community standards' through expert testimony, the State cannot prevail. Several cases are cited in support of this contention. However, the Appellants concede that some Courts have held that affirmative proof on the issue of community standards is not necessary in obscenity cases. However, they contend that the decisions are in the minority, most are pre-*Redrup* and in many of them there is a finding that the material involved is hard core pornography, that is, *material which depicts sexual activity*. We believe that the mere existence of the magazines here involved was sufficient without expert testimony to present a jury question. We conclude that expert testimony is not required."

It must therefore logically follow that if the Supreme Court of the United States may, by considering the material alone, hold that certain material is constitutionally protected by the First Amendment, as the Court has so ruled in its many *Redrup* reversals, then the Supreme Court of Georgia in like manner may find, as a matter of law, that the material and films involved in this case are obscene and are not protected by the First and Fourteenth Amendments to the United States Constitution, without the assistance of expert testimony.

3. THE PROCEDURE EMPLOYED IN THE ADVERSARY HEARING WAS PROPER AND CONSISTENT WITH THE FIRST, FOURTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

After the motion picture films "It All Comes Out In The End" and "Magic Mirror" had been viewed in their entirety, Respondents filed a Complaint against Paris Adult Theatres I and II; and a Rule Nisi was issued by the Fulton Superior Court directing the Theatres to appear on a day certain in order that an adversary hearing could be held to determine the question of obscenity. The Theatres were required to produce one (1) print of each of the motion picture films and the proper equipment for exhibiting the same to the Court. They were restrained only from concealing, altering, mutilating or destroying the said films or removing them from the jurisdiction of the Court.

The procedure employed by the Respondents in this case is far more protective of the Constitutional rights of the Exhibitors than is the procedure in any of the cases cited by the Theatres or suggested in the Petition for Writ of Certiorari, for no restraint whatsoever is placed upon the exhibition of the motion picture films involved until after a hearing is had thereon and the Courts have determined that the material is in fact and in law obscene. Until this determination is made the Exhibitors are free to continue exhibiting the films, as was done in this case; and, therefore, the length of time between the filing of the Complaint and the hearing operates to no detriment to the Exhibitor at all.

This procedure was first established in this District in *Gable v. Jenkins*, 309 Fed.Supp. 998, United States District Court, Northern District of Georgia, Atlanta Division, affirmed 90 S.Ct. 1351, wherein the Court held on Page 1001:

"There is a proper procedure existing in Georgia law that can achieve Constitutional standards, i.e.,

a prior adversary judicial proceeding before the seizure of the allegedly obscene items."

FOOTNOTE 3:

As example, the following are presented: *** An order to show cause why the alleged obscene film is not obscene could be served on the possessor: ***.

This type of procedure was approved in *Metzger v. Percy*, 393 Fed.2d 202 (7th Circuit 1968). *Tyrone v. Wilkinson*, 410 Fed.2d 639 (4th Circuit 1969); *Bethview v. Kahn*, 416 Fed.2d 410.

In each of the latter cases the Courts ordered the return of the alleged obscene material seized because no adversary hearing was held prior to the seizure of such materials. However, it is significant to note that the possessor was ordered to make one (1) print available to the State for prosecution purposes.

The procedure employed in the case at bar was approved by the Supreme Court of Georgia in the cases of *1024 Peachtree Corporation, et al v. Slaton*, 228 Ga. 102; 184 S.E.2d 144; *Walters v. Slaton*, 227 Ga. 676; 182 S.E.2d 464 (four cases); *Evans Theatre Corporation v. Slaton*, 227 Ga. 377, 180 S.E.2d 712.

The cases relied upon by the Petitioners are clearly distinguishable from the case at bar. The vice of *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, is not found in the Georgia procedure. *Freedman* involved a Board of Censors. The statute provides that it shall be unlawful to exhibit any motion picture film until the film has been submitted to and approved by the Maryland State Board of Censors.

The Chicago Motion Picture Ordinance involved in *Teitel Film Corporation v. Cusack*, 390 U.S. 139, 88

S.Ct. 754, prohibits the exhibition in any public place of "any picture . . . without having first secured a permit therefor from the Superintendent of Police." If the permit was denied, the burden was on the Exhibitor to pursue the case through a series of Appeal Boards, all the while the picture could not be exhibited.

The same evil was found in *U.S. v. The Book Bin*, 306 Fed. Supp. 1023, affirmed 400 U.S. 410.

The precise question of whether or not obscenity can be controlled by injunction is not new to this Court, and has been decided adversely to Petitioner's contentions. In *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1956), this Court upheld the constitutionality of a New York statute authorizing the injunction of obscene prints and articles by the Supreme Court of New York, without a jury, upon the complaint of the chief executive or legal officer of any city, town or village. In said decision this Court stated:

"It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a qui tam action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice. See *Tigner v. Texas*, 310 U.S. 141, 148. If New York chooses to subject persons who disseminate obscene 'literature' to criminal prosecution and also to deal with such books as deodands of old, or both, with due regard, of course, to appropriate opportunities for the trial of the underlying issue, it is not for us to gainsay its selection of remedies.

The procedure involved in the adversary hearing process employed in this case is fully protective of the Con-

stitutional rights of the Exhibitors, for no restraint whatsoever is placed upon the exhibition of the motion picture film involved until after a hearing is had thereon and the Courts have determined its obscenity. Until such judicial determination, the Exhibitors are free to continue exhibiting the film or films as was done in this case.

The Supreme Court of Georgia found the films to be obscene because they are obscene.

CONCLUSION

For all of the foregoing reasons, Respondents urge this Court to decline to issue a Writ of Certiorari in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States in good standing, and that I have this day deposited in the United States Post Office, Atlanta, Georgia, three (3) copies of the foregoing Brief of Respondents in Opposition to Petition for Writ of Certiorari with first class postage prepaid addressed to Mr. Robert Eugene Smith, Esquire, Suite 507, 102 West Pennsylvania Avenue, Towson, Maryland 21204, and also three (3) copies of the same addressed to Mr. D. Freeman Hutton, Esquire, Suite 2005, 1175 Peachtree Street, N.E., Atlanta, Georgia 30309, counsel of record for Petitioners.

This the 26 day of May, 1972.

~~Original Filed By~~
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IN THE
Supreme Court of the United States

October Term, 1971

No. 71-1051

PARIS ADULT THEATRE I, ET AL,
Petitioners,

v.,

**LEWIS R. SLATON, DISTRICT ATTORNEY,
ATLANTA JUDICIAL CIRCUIT, ET AL,**
Respondents.

ON WRIT OF CERTIORARI FROM THE
SUPREME COURT OF GEORGIA

Errata Sheet to Petitioners' Brief

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Errata Sheet

- Cover, "Mell S. Friedman, Esq." should be "Mel S. Friedman, Esq."
- Page ii, Line 13, "provisional" should be "procedural".
- Page 12, Line 3, should read "than communication of other ideas. In *Stanley* there was no".
- Page 14, Line 12, should read "(rationale) cannot be left ajar; it must be kept tightly".
- Page 22, Line 27, "accompainment" should be "accompaniment".
- Page 30, Line 8, should read "opinion, relying on the provisions of *Redrup v. New York, supra*."
- Page 31, Line 12, should read "minors were permitted on the premises and that a modest but".
- Page 33, Line 9, should read "Of the motion pictures involved, in none are".
- Page 34, Line 8, "pretence" should be "pretense".
- Page 54, Line 13, "retain" should be "retail".
- Page 55, Line 13, "transcedent" should be "transcendent".
- Page 59, Line 27, "devient" should be "deviant".
- Page 74, Line 12, "negligent-homocide" should be "negligent-homicide".
- Page 78, Line 21, "PROVISIONAL" should be "PROCEDURAL".
- Page 94, Line 10, "Tennage" should be "Teenage".
- Page 96, Line 6, "mailes." should be "mails."
- Page 96, Line 8, "stereotypicany" should be "stereotypically".
- Page 96, Line 8, "sophitisticated" should be "sophisticated".
- Page 96, Line 18, should read "and that the emphasis in so-called obscenity litigation should".
- Page 108, Line 8, "definiton" should be "definition".

Page 108, Line 23, should read "minors or offering to exhibit to minors contrary to any state".

Page 108, Line 25, "Ideed" should be "Indeed".

Page 110, Line 2, should read "of *First Amendment* rights of Petitioners therein stated:".

Page 111, Line 11, "and;or" should be "and/or".

Page 111, Line 15, should read "629 (1968), in holding the state statute in question constitutional as reflecting".

Page 111, Lines 26 and 27, delete in their entirety.

Page 112, Line 4, " 'juveniles.' " should be " 'juveniles,' ".

Page 112, Line 5, "Ginzburg pandering" should be "*Ginzburg pandering*".

Page 112, Line 6, "and;or" should be "and/or".

Page 114, Line 30, should read "in *Roth*, at page 47, 'sex and obscenity are not synonymous.' "

Page 121, Line 4, "Stanley" should be italicized.

Page 121, Line 8, "procoursor" should be "precursor".

Page 127, Line 28, "Rehyquist" should be "Rehnquist".

108 Line 53 should read: minors or offspring in exhibit
in minors contrary to any state

Trace 108, Line 25, "lead" should be "instead"

Page 140. E. J. should read "of the same" and "of the same" should read "of the same".

state statute in question constitutes a violation of the

1947-1948

CONFIDENTIAL

of Reading, which "exhibits" to the "public" a "new" and "original" work, "the" "first" "time" "in" "the" "history" "of" "the" "world".

1. The first of these is the fact that the

Page 121, Line 8, "preconstr" should be "preconstr"

1. The "L. B. Nichols" was "detained".

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1. The Two (2) Motion Picture Films which are the subject matter of these proceedings and determined by the Trial Court to be not obscene, but by the Supreme Court of the State of Georgia to be obscene, are not obscene in the constitutional sense and are protected expression under the First and Fourteenth Amendments to the United States Constitution .. 13
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LEWIS R. SUTTON, DISTRICT ATTORNEY
ATLANTA JUDICIAL CIRCUIT, ET AL.

Respondents

OFFICE OF CERTIFICATION FROM THE
SUPREME COURT OF GEORGIA

PETITIONERS' BRIEF

OPINIONS BELOW

The order of the Trial Judge in the Superior Court of
Fulton County is not reported and is found on pages 23 and
24 of the Appendix. The decision of the Superior
Court of Georgia and the United States District Court
for the Northern District of Georgia are reported in
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100 F.2d 1000.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-1051

PARIS ADULT THEATRE I, ET AL,
Petitioners,

v.

LEWIS R. SLATON, DISTRICT ATTORNEY,
ATLANTA JUDICIAL CIRCUIT, ET AL,
Respondents.

ON WRIT OF CERTIORARI FROM THE
SUPREME COURT OF GEORGIA

PETITIONERS' BRIEF

OPINIONS BELOW

The Order of the Trial Judge in the Superior Court of Fulton County is not reported and is found on pages 33 and 34 of the Appendix herein. The decision of the Supreme Court of Georgia and the Order denying the Motions for a

Rehearing are found on pages 1 through 5 and 14 of the Appendix, respectively. The decision of the Supreme Court of Georgia is reported at 228 Ga. 343 (1971).

JURISDICTION

The Supreme Court denied the Petitions for Rehearing and substituted its final opinion for that entered on November 5, 1971 on November 18, 1971. The Petition for a Writ of Certiorari was filed February 16, 1972 pursuant to 28 U.S.C. § 1257 (3). On June 26, 1972, this Court granted certiorari.

QUESTIONS PRESENTED

1. Whether The Two (2) Motion Picture Films Which Are The Subject Matter Of These Proceedings, And Determined By The Trial Court To Be Not Obscene, But By The Supreme Court Of The State Of Georgia To Be Obscene, Are Not Obscene In The Constitutional Sense And Are Protected Expression Under The *First* and *Fourteenth* Amendments To The *United States Constitution*?

2. Whether There Can Be A Constitutionally Valid Judicial Determination Of Obscenity As To Each Of The Films Brought Before The Supreme Court, Consistent With Petitioners' Rights To Procedural And Substantive Due Process Required By The *Fifth* and *Fourteenth* Amendments To The *Constitution Of The United States*, In The Absence Of Any Affirmative Evidence On Each Of The Constitutionally Relevant Elements Of The Standards For Judging Proscribable Obscenity Under The *First Amendment*?

3. Whether The State Of Georgia May, Consistent With The *First, Fourth, Fifth, and Fourteenth Amendments* To The *Constitution Of The United States*, Utilize *Ad Hoc* Procedures To Enjoin Dissemination Of Presumptively Protected *First Amendment* Materials Where There Is No Statutory Or Authoritative Judicial Decision Authorizing The Same With Appropriate Procedural Safeguards?

4. Whether The Display Of Any Sexually Oriented Films In A Commercial Theatre, When Surrounded By Notice To The Public Of Their Nature And By Reasonable Protection Against Exposure Of The Film To Juveniles, Is Constitutionally Protected?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the *First, Fifth, Sixth* and *Fourteenth Amendments* to the *Constitution of the United States* and the *Code of Georgia*, § 26-2101, are found in Appendix D of the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

Petitioners Paris Adult Theatre I and Paris Adult Theatre II comprise an "Adults Only" theatre at 320 Peachtree Street, N.E., Atlanta, Georgia. Entrance to each of the two theatres is gained through a common lobby. On December 28, 1970, the movie, "It All Comes Out In The End" was showing in one theatre and the movie, "Magic Mirror" was showing in the other. Investigators of the Criminal Court of Fulton County viewed each of the films on the above date (A. 50, 56). Subsequently, on the same day, two separate complaints (one

for each film and theatre) were filed in equity, asking that the films be declared obscene and that their further exhibition be temporarily and permanently enjoined after a hearing on the issue of obscenity (A. 19-21; 38-40). Various personnel of the theatres, none of whom are appellants herein, were served with the complaints and the order of the Superior Court of Fulton County temporarily restraining and enjoining the defendants from concealing, destroying, altering or removing the motion picture films from the jurisdiction of the Court. Defendants were further ordered to have one print each of the films, as they were exhibited on the 28th day of December, 1970, in Court on the 13th day of January, 1971, together with the proper equipment for viewing the same. (A. 22, 23, 41-45).

On the 13th day of January, 1971, the films were produced by attorneys for the theatres, after one of the defendants served had been held in contempt for refusing to furnish the films on the ground that to do so might incriminate him (A. 49, 50).

The hearing was stipulated by the parties to be a final one (A. 35). At said hearing on the issue of the obscenity of the films, no evidence was introduced by Respondents as to their obscenity, except the films themselves. There was no evidence that the films, when considered as a whole, predominantly appealed to a prurient interest in nudity, sex or excretion. There was no evidence that said films were patently offensive because they went substantially beyond the customary limits of candor in the depiction of sex or nudity, applying contemporary community standards. There was no evidence by the Respondent of any kind as to what

constituted the contemporary community standards of any community, local, state, or national.

On the other hand, Petitioners produced testimony that the predominant appeal of the films was not to a prurient interest in sex (A. 70) and that the films were of value to society (A. 70, 71).

Evidence revealed that the theatres were for "Adults Only" and that the films were not advertised, except as to their name (A. 51, 52). There was no evidence that minors had ever entered the theatres or seen the films and there was evidence of an intent to exclude minors (A. 57).

At the conclusion of the evidence, the Trial Court took under advisement the Motions To Dismiss filed by Petitioners which raised, *inter alia*, the contention that the films were not obscene in the constitutional sense as a matter of law and were protected expression, under the *First and Fourteenth Amendments*, to the *Constitution of the United States*. Subsequently, the Trial Court granted the Motions to Dismiss on the ground that the films were not obscene. (A. 33, 34). Timely appeal was taken by Respondents, and the Trial Court was reversed on November 5, 1971 (A. 1) with Petitions for Rehearing being denied on November 18, 1971 (A. 14).

SUMMARY OF ARGUMENT

1.

The two motion pictures found obscene by the Supreme Court of Georgia are not hard-core pornography and are not obscene in the constitutional sense. Borderline materials are entitled to the mantle of the full constitutional protections of Free Speech and Press under the *First* and *Fourteenth Amendments* to the *Constitution of the United States*, unless the rights of those whom the state has a legitimate interest in protecting are encroached upon. *Roth v. United States*, 354 U.S. 476, 489 (1957), made clear that the door barring Federal and State intrusion into the Free Speech and Press area must be opened only as far as necessary to prevent encroachment upon more important interests. Those interests are suggested by the dissent of Mr. Justice Stewart in *Ginzburg v. United States*, 383 U.S. 463 (1966), which later became the foundation of the *per curiam* opinion of the Court in *Redrup v. New York*, 386 U.S. 767 (1967). These interests, as suggested in *Redrup, supra*, are exemplified by a statute with a specific or limited concern for juveniles; by "an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it"; and by the sort of pandering found significant in *Ginzburg v. United States, supra*.

The films involved herein are comparable to those found not to be obscene by this Court in the reversals of obscenity determinations which have cited only *Redrup, supra*. Where, as here, the *Redrup* factors are not present, the films are not obscene and are entitled to constitutional protection.

In proceeding to determine whether materials are obscene, the censor or, in this case, the representatives of the State of Georgia who are Respondents herein have the affirmative responsibility to adduce appropriate evidence to establish each element of obscenity, as it may be defined to comport with Constitutional guarantees. The Respondents herein did not introduce any evidence on any of the constitutionally required elements of obscenity, but instead placed only the films themselves into evidence. The Georgia Supreme Court thus condemned the films without any affirmative evidence other than the films. The censorship of press materials without affirmative evidence other than the films themselves is no more than a misuse of the doctrine of *res ipsa loquitur* and a violation of *First Amendment* rights.

Affirmative proof of each element is required because, without guidance from experts or otherwise, judges and juries are unable to apply the *Roth* standard with anything more definite or objective than their own personal standards of prudence and decency. Members of a jury or the triers of fact are governed by their own standards and not those of the community as a whole, whether state-wide or national. Yet, they must determine contemporary community standards and then compare the materials in question to determine whether they go substantially beyond the limits of candor. They cannot do this without evidence except by the exercise of unfettered discretion, which is not appropriate in determining whether material is entitled to the protection of the *First Amendment*. Similarly, a court or judge cannot take judicial notice of community standards.

To allow a case to go to a jury of laymen or triers of fact on the question of the prurient appeal of the material is to invite the equating, in the minds of the jurors, and/or triers of fact, of patent offensiveness with prurient appeal and aiding suppression simply on the basis of speculation and suspicion about the prurient appeal of material to people whose psyche is not known.

The appropriate community standards by which the material is to be judged are those of the national community, and courts and jurors are less able to apply those to the material without the aid of testimony as to what the standards are.

The standards for judging obscenity are inherently vague and imprecise, and the opinion of the trial judge herein shows the difficulty he had in applying it to the material involved herein. The legal writers and commentators have had the same difficulty in understanding the meaning of the standards for judging obscenity, and numerous state courts have reached the conclusion that affirmative evidence is needed to aid in applying this Court's standards.

A consideration of the separate elements of the test reveals that lawyers, judges and jurors alike are not qualified to determine what a "shameful or morbid interest" in sex or nudity is, or when it constitutes the "primary appeal" of the material. Only expert evidence will provide an objective, rather than a subjective, basis for the fact finder's verdict.

Locally selected jurors cannot be assumed to know what "national" (or even local) contemporary community standards are.

Only expert testimony can establish that materials are "utterly without redeeming social value", given the many artistic, literary, historical, entertainment, informational, and other values which are recognized in this society. The changes in social values, as evidenced by the increasing interest in matter relating to human sexual activities is an indication that the presence or absence of the elements of obscenity cannot be assumed, but must be proven, so as to provide the basis for an objective determination.

The censor has the burden of proving the obscenity of materials alleged to be obscene and to allow such a determination of obscenity to be made without proof of the elements required, denies due process of law and in this context, undermines a broad category of rights guaranteed under the Free Speech and Press provisions of the *Constitution*, as well.

The failure to provide expert testimony on the presence of each element of obscenity in essence shifts the burden of proof to the defendant to prove the nonobscenity of the questioned materials and effectively denies due process.

The application of a *res ipsa loquitur* approach is not appropriate because, unlike the situation involved in negligence cases, the trier of fact in an obscenity case cannot be assumed to be in contact with the requisite facts on an every-day basis as in the typical negligence situation. This is evidenced by the large number of reversals by this Court of determinations of obscenity by juries. Moreover, the standard of guilt in an obscenity case, where the rights of Free Speech and Press are concerned, must be those of "beyond a

reasonable doubt" and not the "preponderance of the evidence" standard of a negligence case.

A failure to require proof of each element of obscenity denies the right to confront witnesses against your position and denies effective assistance of counsel as well.

3.

The decisions of this Court have made clear that a state is not free to deal with obscenity in any way it sees fit without regard for the effect upon materials entitled to constitutional protection. Any prior restraint on expression comes to this Court with a heavy presumption against its constitutionality. The *ad hoc* procedure employed by Respondents herein is not authorized by statute and lacks procedural safeguards against the undue inhibition of protected expression. The Respondents were not obligated to seek judicial review of the trial court's determination within any given time period (except that applicable to all appeals, 30 days) and the trial judge was under no obligation to render a judicial decision within any stated period of time.

The utter lack of procedural safeguards herein is contrary to case law as set forth in numerous decisions of this Court and the Petitioners, who already have been deprived of their films for nearly 20 months, are entitled to a declaration that their *First, Fourth, Fifth and Fourteenth Amendment* rights have been violated and to a reversal of the decision of the Supreme Court of Georgia.

4.

The all-encompassing list of types of materials which persons such as the writers of the Minority Report of the Commission on Obscenity and Pornography claimed to be unprotected makes it clear that this Court will continue to be inundated with obscenity cases unless it adopts an approach which focuses less on the content of allegedly unprotected materials and more on the manner (conduct) of dissemination. Such an approach is that suggested by Professor Thomas I. Emerson in his work, *The System of Freedom of Expression*, wherein he characterizes the thrusting of offensive materials upon those unwilling to view or to receive them as "action".

Such an approach makes the definition of obscenity irrelevant until such time as the allegedly obscene materials have been disseminated in such a way as to encroach upon the rights of others.

In this case, there was no intrusion into the privacy of unwilling individuals who wished to avoid confrontation with the sexually oriented films exhibited by Petitioners and there was no admission of minors.

The decisions of this Court appear to have held that only when there exists an encroachment on the constitutional rights of others may government constitutionally punish an offender for violation of obscenity laws. The decision of this Court in *Redrup v. New York* delineates what may have been meant in *Roth* and *Breard* by "encroachment" upon rights of others.

The discussion in *Stanley v. Georgia* of "the right to receive ideas, regardless of their social worth," would indicate that communication of ideas about sex are no less protected than communicating other ideas. In *Stanley* there was no encroachment upon the rights of others and the possession of concedely obscene films was held to be constitutionally protected. On the other hand, in *United States v. Reidel*, *supra*, and *United States v. Thirty-Seven Photographs*, *supra*, both of which involved materials either conceded to be obscene or assumed to be so for the purposes at hand, the manner of dissemination could not be said to exclude intrusion upon the privacy of those unwilling to receive the materials or to exclude distribution to minors. Thus, the question involved here was not resolved by those opinions. Nor are the materials conceded to be obscene in this case.

The concurring opinion of Mr. Chief Justice Burger in *Rabe v. Washington*, *supra*, indicates once again that it is blatant "public displays of explicit materials" which involve no "significant countervailing First Amendment considerations." The facts of the case make clear that "public" used therein meant "intrusive and unavoidable."

ARGUMENT

1. THE TWO (2) MOTION PICTURE FILMS WHICH ARE THE SUBJECT MATTER OF THESE PROCEEDINGS, AND DETERMINED BY THE TRIAL COURT TO BE NOT OBSCENE, BUT BY THE SUPREME COURT OF THE STATE OF GEORGIA TO BE OBSCENE, ARE NOT OBSCENE IN THE CONSTITUTIONAL SENSE AND ARE PROTECTED EXPRESSION UNDER THE *FIRST AND FOURTEENTH AMENDMENTS* TO THE *UNITED STATES CONSTITUTION*.

At the time of the hearing before the Trial Court in the case at bar, the Prosecution contended that the two (2) movies were obscene under Georgia Law and under the *First Amendment* to the *Constitution of the United States*. Counsel for Petitioners contended that the two (2) motion picture films before the Court were not hard-core pornography or obscene in the constitutional sense as set forth in the various constitutional standards for judging obscenity set forth by the members of this Court in *Redrup v. New York*, 386 U.S. 767 (1967). Petitioners, by their counsel, further contended before the Trial Court that the movies were, at the most, borderline, as would be all publications that dealt with an erotic theme, but that did not render them obscene in the constitutional sense.

Counsel for Petitioners further contended that borderline publications are entitled to the mantle of the full constitutional protections of Free Speech and Press under the *First and Fourteenth Amendments* to the *Constitution of the United States* unless the conduct of the exhibitor was such as to encroach on the rights of others whose responsibility it was

for the State of Georgia to protect through its legal processes.

In this regard, Counsel for Petitioners was relying on the words of the Court set forth in *Roth v. United States*, 354 U.S. 476 (1957) at page 489 where it was written:

"The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the State. The door barring federal and state intrusion into this area (obscenity litigation and the free press rationable) cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest."

Counsel for Petitioners herein urged to the Trial Court that the comment in the dissent of Mr. Justice Stewart in *Ginzburg v. United States*, 383 U.S. 463 (1966) which later became the foundation of the *Per Curiam* opinion of the Court. *Redrup v. People of the State of New York*, *supra*, was particularly applicable where the learned Justice wrote, in part, as follows at footnote 1 of his opinion at page 498:

"1. Different constitutional questions would arise in a case involving an assault upon individual privacy by publication in a manner so blatant or obtrusive as to make it difficult or impossible for an unwilling individual to avoid exposure to it. Cf. e.g., *Breard vs. Alexandria*, 341 U.S. 622; *Public Utilities Commission v. Pollak*, 343 U.S. 451; *Griswold vs. Connecticut*, 381 U.S. 479. Still other considerations might come

into play with respect to laws limited in their effect to those deemed insufficiently adult to make an informed choice. No such issues were tendered in this case."

The words of the Court in the *Per Curiam* Opinion in *Redrup v. New York*, *supra* contain in essence the same observation made by Mr. Justice Stewart in *Ginzburg v. U.S.* where the Court at page 769 wrote as follows:

"IN NONE of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See *Prince vs. Massachusetts*, 321 U.S. 158; cf. *Butler vs. Michigan*, 352 U.S. 380. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. *Breard vs. Alexandria*, 341 U.S. 622; *Public Utilities Comm'n vs. Pollak*, 343 U.S. 622. And in none was there evidence of the sort of 'pandering' which the Court found significant in *Ginzburg vs. United States*, 383 U.S. 462."

The Trial Court was also exposed to a list of the cases considered by the U.S. Supreme Court which had been reversed predicated on *Redrup v. New York*, *Supra*. Predicated on what the Trial Court understood was meant by the various rulings of this Court as to non-hard-core material, the said Trial Court sitting as both Judge and Jury in its written opinion dated April 12, 1971 and reproduced in full in the Appendix to this Petition, stated in part as follows:

"Assuming that obscenity is established by a finding that the actors cavorted about in the nude indiscriminately, then these films may fairly be

considered obscene. Both films are clearly designed to entertain the spectator and perhaps, depending on the viewer, to appeal to his or her prurient interest. The portrayal of the sex act is undertaken; but the act itself is consistently only a simulated one if, indeed, the viewer can assume an act of intercourse or of fellatio is occurring from the machinations which are portrayed on the screen. Each of the films is childish, unimaginative, and altogether boring in its sameness."

"It appears to the Court that the display of these films in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against exposure of these films to minors, is constitutionally permissible."

"It is the Judgement of this Court that the films, even though they display the human body and the human personality in a most degrading fashion, are not obscene."

The Trial Court was, we suggest, correctly following the law as it has been enunciated by this Court in the decisional processes. This Court has considered films of even a more explicit nature than the motions pictures at bar and in the absence of factors which would suggest circumstances of dissemination that would intrude onto the rights of others, or minors, have reversed the following based on *Redrup v. New York, Supra*:

1. *Harry Schackman v. California*, 388 U.S. 454 (1967).

This Court reversed the Superior Court of California which had affirmed the conviction of appellant for utilizing coin operated "peep-show movies" that were charged as being obscene. The Supreme Court decision was per curiam,

contained no description of the movies and referred to *Redrup* as controlling authority for holding the movies not obscene.

A look at the travel of the case will reveal a description of the films by the United States District Court for the Central District of California in the matter styled *Schackman v. Arnebergh*, 258 F. Supp. 983 (1966). The appellant originally had been arrested for trial in a California state court. The defendant thereafter filed a complaint in federal court seeking to convene a three-judge court on constitutional grounds, which relief was refused. An appeal was then taken to the Supreme Court of the United States which held by per curiam opinion that the proper route of appeal in those circumstances was by way of the Court of Appeals and denied the appeal, *Schackman v. Arnebergh*, 387 U.S. 427. Thereafter the state trial court convicted the defendant and he appealed through the state courts and ultimately to the Supreme Court of the United States where his conviction was reversed and the Court held the material not obscene.

The descriptive opinion in the federal district court, 258 F. Supp. 983, stated, *inter alia*:

"1. As to 0-12:

"The film consists of a female model clothed in a white blouse open in the front, a half-bra which exposes the upper half of the breasts including the nipples and a pair of white capri pants (which are soon discarded) under which the model wears a pair of sheer panties through which the pubic hair and region are clearly visible. The film consists of the model moving and undulating upon a bed, moving her hands, lips and torso, all clearly indicative of engaging

in sexual activity, including simulated intercourse and invitations to engage in intercourse.

"There is no music, sound, story line or dancing other than exaggerated body movements. On at least three occasions, the female by lip articulation is observed to state, 'fuck you,' 'fuck me.' The dominant theme of the film taken as a whole, obviously is designed to appeal to the prurient interest in sex of the viewer and is patently offensive in that the focus of the camera returns again and again to the genital and rectal area clearly showing the pubic hair and the outline of the external parts of the female genital area."

"2. 0-7:

"The model wears a garter belt and sheer transparent panties through which the pubic hair and external parts of the genitalia area clearly visible. For at least the last one-half of the film, the breasts are completely exposed. At one time the model pulls her panties down so that the pubic hair is exposed to view. Again, the focus of the camera is emphasized on the pubic and rectal regions and the model continuously uses her tongue and mouth to simulate a desire for, or enjoyment of, acts of a sexual nature. The dominant theme of the film, taken as a whole, appeals to a prurient interest in sex of the viewer and is patently offensive in its emphasis on the genital and rectal areas, clearly showing the pubic hair and external parts of the female genital area."

"3. D-15 was held to be substantially the same in character and quality as the films 0-12 and 0-7."

"33. The film E-44 'Susan, referred to in paragraph 11 of the petitioners' complaint and introduced as Exhibit 4, is virtually the same as Exhibits 1, 2 and 3. In addition, the model uses her hands, fingers, lips and tongue to simulate an act of oral copulation. Again, the pubic hair is visible together with the external parts of the genitalia and the focus of the camera emphasizes this area. The model continuously simulates acts of a sexual nature, including sexual intercourse and invitations to engage in such activity. The dominant theme of the film, taken as a whole, is to the prurient interest in sex of the viewer. It is patently offensive and is utterly without redeeming social importance.

"34. The film known as Exhibit 19, of the Los Angeles Municipal Court Case No. 150754, referred to in paragraph 4 of the complaint and introduced as Exhibit 5, was viewed by the Court. The Court finds Exhibit 5 to be not quite as repugnant nor flagrant an example as Exhibits 1 through 4. In Exhibit 5, the pubic hair cannot be seen and the simulation of sexual intercourse is not as patent. Still, the model moves her body and hands in obviously sexual ways to simulate sexual activities and the camera's focus again emphasizes the pubic and rectal regions. The dominant theme of the film, taken as a whole, is to a prurient interest in sex of the viewer. It is patently offensive and is utterly without redeeming social importance."

In the Opinion it was further stated:

"The Court concludes as a matter of law that the exhibits and each of them are clearly, unequivocally and incontrovertibly obscene and pornographic in the hard core sense because they come within the reasonable

purview and ambit of both the Federal judicial definition of obscenity and hard core pornography."

This Court found the above described films not to be obscene in the constitutional sense, thus in total disagreement with the findings of the learned Federal District Court trial judge. See: *Schackman v. California*, 388 U.S. 454 (1967).

2. *I. M. Amusement Corporation v. Ohio*, 389 U.S. 573 (1968).

Film strip of two nude females acting like Lesbians and fondling one another found not constitutionally obscene, citing *Redrup, supra*, as authority.

See the lower court case styled *State v. I. & M. Amusements, Inc.*, 226 N.E. 2d 567, where the Supreme Court of Ohio affirmed the Court of Appeals of Ohio, Hamilton County, convicting a motion picture corporation of exhibiting an obscene motion picture film.

The Supreme Court of Ohio set forth the descriptive testimony of an expert witness at the trial level:

"The same thing might be said of the defense expert witness on the subject of motion picture standards and practices, that the one segment of the film in question was simply 'a documentation of moving pinups, in some cases static pinups, '—a pinup being 'simply females who are, who have exposed, who are undressed within the convention of a pinup. A pinup is simply a convention of undress which excludes any dress other than a covering in the lower regions of some standard form. The movie I say was a documentation of a series of pinups who, in some cases, were in motion. In most cases were static.' "

Thereafter the Court set forth the descriptive quote of the trial judge:

"In addition to either the static or moving pinups, the court below made a specific finding in regard to one series of scenes in the film that, 'two women, at least nude to the waist, going through actions that could lead to no conclusion in my opinion except that they were behaving like lesbians.' "

However, when the case reached this Court in *I. M. Amusement Corp. v. Ohio*, 389 U.S. 573, the state decisions were reversed in a per curiam opinion based upon *Redrup* holding in essence that the motion picture film was not obscene for adults.

3. *Robert-Arthur Management Corp. v. Tennessee*, 388 U.S. 578 (1968).

Motion picture film entitled *Mondo Freudo* showing women caressing one another and acting as Lesbians found not constitutionally obscene based on *Redrup*, *supra*, as the controlling authority therefor.

See the case styled *Robert Arthur Management Corp. v. State of Tennessee*, 414 S.W. 2d 638 (1967), wherein the Supreme Court of Tennessee, in affirming the trial court's finding that the film *Mondo Freudo* was obscene, stated:

"We have reviewed the evidence and have seen the film. We agree with the trial judge. This film, considered as a whole, not only predominantly appeals to the prurient interest; in fact it has no other possible appeal. If this film is not patently offensive to the public or does not go substantially

beyond customary limits of candor in dealing with sex, then we do not think it possible to make such a film. Under the third element necessary in a finding of obscenity witnesses for the exhibitor testified the film informed people of certain existing conditions. This film does inform people sexual filth exists in the world. We presume the argument to be, since sexual filth does exist, and this film only informs people of such, then the film is not obscene. If this be the argument we reject such. The effect of the film is just to add to the sexual filth already in the world. We find the film to be devoid of any literary, scientific or artistic value and utterly without social importance."

4. *Cain v. Kentucky*, 397 U.S. 319 (March 23, 1970).

This decision involved the motion picture *I, A Woman*.

A description of the film is set forth by the Court of Appeals for Kentucky in the case styled *Cain v. Commonwealth of Kentucky*, 437 S.W. 2d 769 (1969), wherein it was stated:

"We have viewed the evidence presented to the trial jury. The film is a 90-minute motion picture devoted almost entirely to the sexual encounters of one female by the name of Eve. It opens by showing Eve nude in her bedchamber engaged in the practice of caressing herself in a suggestive manner to the accompaniment of her father's violin. She progresses to a passionate love scene with her fiance, Svend, while lying fully clothed on top of him in her bedchamber. This act is performed with the camera full on the subject. From this the film proceeds to the act of intercourse with a married patient, Heinz Goertzen, in a hospital room where Eve is employed

as a nurse. This act she solicits with the use of nude photographs taken of her by her fiance for this specific purpose. During the course of the sequence, the camera focuses upon the head of the male partner and the stomach area of the female partner. It shows the male partner caressing with kisses the area between the navel and the pubic hair. The camera then shifts during the act of intercourse to the face of the female subject. After this, the film follows the life of Eve from one act of sexual intercourse to another until it has been accomplished some five times, all with different partners. Each time the act is as vividly portrayed upon the screen as was the scene in the hospital room. In one instance the sex act is in the form of rape. The film represents nothing more than a biography of sexuality. There is no story told in the film; it is nothing more than repetitious episodes of nymphomania. Nudity is exposed in such manner that if the subject had posed in person instead of on film she would have immediately been arrested for indecent exposure. We are of the opinion that the jury not only had sufficient evidence before it upon which to base its verdict but that this evidence was overwhelming."

This Court reversed this judgment in a 6-2 per curiam decision, citing *Redrup v. New York, supra*, as authority therefor.

5. *People of California v. Pinkus*, 400 U.S. 922 (1970).

This Court left standing a decision of the Ninth Circuit which held a stag movie graphically depicting a woman engaged in masturbation not to be obscene by a divided Court in affirming the judgment of the Ninth Circuit of Appeals in case there styled as *Pinkus v. Pitchess*, 429 F.2d 416.

Pinkus was charged with committing sixteen violations of the California Obscenity Statute but only nine of the sixteen were submitted to the Jury and he was found guilty. The Petition for habeas corpus followed and the Circuit Court of Appeals ultimately reversed and in doing so, stated as follows:

"We have concluded that it was. The 'worst' of the material is described as a motion picture of a woman who, disrobed, feigns some type of sexual satisfaction which is self-induced. The film is apparently typical of the usual 'stag' movies which the courts encounter with increasing frequency. In the state court trial, the prosecution introduced no persuasive testimony that the material was offensive to contemporary notions of free expression. The district judge, as did the state court jury, made the factual determination that the film was obscene, but we have concluded that we cannot reconcile the determination with Supreme Court decisions in several cases involving comparable material. See, e.g., *Bloss v. Dykema*, U.S. , 38 U.S.L.W. 3477 (1970); *Redrup v. New York*, 386 U.S. 767, 18 L. Ed. 2d 515, 87 Sup. Ct. 1414 (1967). See especially, *Aday v. United States*, 388 U.S. 447, 18 L. Ed. 2d 1309, 87 Sup. Ct. 2095 (1967), *revq.* 357 F. 2d 855 (6th Cir. 1966).

6. *Bloss v. Michigan*, 402 U.S. 938 (1971).

This Court reversed the conviction for showing an obscene movie entitled "A Woman's Urge" of Floyd G. Bloss, citing *Redrup*. The Court of Appeals for the State of Michigan in its decision entitled *The People of the State of Michigan v. Floyd G. Bloss*, had adopted the trial judge's recital of the pertinent facts:

"The pertinent facts are set forth in the trial judge's decision on the motion for new trial:

"The testimony at the trial indicated that "A Woman's Urge" was shown at the Capri Theatre from February 2nd to February 8, 1966. On the evening of February 3, 1966 certain police officers and officials of the city of Grand Rapids, together with professors from Calvin and Aquinas Colleges attended the showing of "A Woman's Urge". Thereafter, a meeting was held at the prosecuting attorney's office and on the evening of February 8, 1966, members of the vice squad purchased tickets for the showing of "A Woman's Urge" and saw the entire film. Immediately thereafter, two members of the vice squad, who had seen the movie, went to the projection booth, there found Billy C. Sturgess in the projection booth, rewinding the film to "A Woman's Urge". The officers identified themselves and arrested Mr. Sturgess and seized the film incidental to the arrest. Thereafter they permitted Mr. Sturgess to continue showing the motion picture which was then being shown and subsequently brought him to the police department where he was served with a complaint and warrant. Likewise a complaint and warrant were served upon Mr. Bloss, who came to the police department at the request of the police officers. At the trial several police officers testified in detail as to the movie and applied the "Roth test" to the movie. In addition an expert witness from Aquinas College was called who testified relative to the movie and applied the Roth test. The jury, after extensive deliberation, convicted Mr. Bloss.

"We must decide, therefore, whether the film is obscene in the constitutional sense as delineated by the Supreme Court of the United States. See *Roth v. United States*, *supra*; *Redrup v. State of New York* (1967) 386 U.S. 767 (87 S.Ct. 1414, 18 L.Ed. 2d 515); *Memoirs v. Massachusetts* (1966), 383 U.S. 413 (86 S.Ct. 975, 16 L.Ed. 2d 1); *Ginzburg v. United States* (1966) 383 U.S. 463 (86 S.Ct. 942, 16 L.Ed. 2d 31); *Mishkin v. New York* (1966) 383 U.S. 502 (86 S.Ct. 958, 16 L.Ed. 2d 56). For us to find that this movie is obscene, we must find that the dominant theme of the movie as a whole appeals to prurient interest in sex, that it is patently offensive because it goes beyond contemporary community standards relating to the description or representation of sexual matters, and that it is utterly without redeeming social value. *Roth v. United States*, *supra*. Unless we find that these three elements coalesce, we cannot find that it is obscene. *Memoirs of a Woman of Pleasure v. Massachusetts*, *supra*, 419. We viewed the film, and we find the necessary coalescence here. Therefore, we find the film to be obscene.

"The film deals with the problems of a seemingly oversexed young woman. Although it has a pseudo psychoanalytical approach, its primary appeal is to prurient interest in sex. This prurient appeal is the dominant theme of the movie as a whole. The film is utterly without redeeming social value. Further, we find that it goes beyond the contemporary national community standards in its descriptions and representations of sexual matters. We would note here that in making this decision as to whether this film goes beyond the contemporary standards, we took into

consideration not just the content of the film, but also the impact of the conditions under which this content is conveyed to the viewer. By this we mean that even though the acts and occurrences if they were described in the written word would not be obscene, the visual impact of seeing the same thing acted out in a darkened room with sound accompaniment may cause it to be obscene. We find support for this distinction in *Landau v. Fording* (1966) 245 Cal. App. 2d 820 (54 Cal. Rptr. 177), *aff'd per curiam*, 38 U.S. 456 (87 S.Ct. 2109, 18 L.Ed.2d 1317) (1967) 5-4, *reh. denied*, 389 U.S. 889 (88 S.Ct. 16, 19 L. Ed. 2d 199) (1967)."

Yet, the Supreme Court of the United States granted the *Petition for a Writ of Certiorari* and reversed.

7. *Hartstein v. Missouri*, 404 U.S. 988 (1971).

On Tuesday, December 14, 1971, this Court reversed an obscenity conviction obtained in the State of Missouri. The reversal was based on *Redrup v. People of the State of New York*, 386 U.S. 767 (1967).

The Supreme Court of Missouri described the material involved, a motion picture entitled "Night of Lust," as follows:

"...[I]n most if not all instances without any relation to the plot, if any can be said to exist, are scenes of nude women including closeup portrayals of naked breasts... 'Night of Lust' is approximately 65 minutes in length, and approximately 40 of those

minutes consist of scenes of nude girls in various poses, actions, and sequences, which bear no relation to a plot, and apparently are presented for the sole purpose of depicting nude girls in activity suggestive of sexual intercourse or of homosexual activity.

"Under no possible standard could the motion picture 'Night of Lust' be related to art, literature or scientific works. It is the portrayal of nude women, which when considered alone may not be considered obscene according to language in *Manual Enterprises, Inc. v. Day*, *supra*, or obscene for adults. *Ginsberg v. State of New York*, *supra*. However, that is not the limits of the portrayal in 'Night of Lust.' By reason of the closeup scenes, and by use of nude body gyrations and undulations the motion picture suggests promiscuous sexual intercourse and homosexual activity which is totally unrelated to any plot. Such scenes are patently offensive and are incorporated into the picture only to appear to the prurient interest of the viewer. Such portrayals are not 'fragmentary and fleeting,' *Jacobellis v. State of Ohio*, *supra*, but because of the quantity of such portrayals, the result is that the dominant theme of the picture, when considered as a whole, is the suggestion of promiscuous sexual intercourse and homosexuality." (Emphasis added.)

8. *Wiener v. California*, 404 U.S. 988 (1971)

This Court reversed judgment of the Appellate Department, Superior Court of California, County of San

Diego, based on *Redrup v. People of the State of New York, supra*. The following magazines and films were the subject matter of the California judgment:

A magazine entitled "My-O-My"

A magazine entitled "Wild-n-Sassy"

A magazine entitled "Hello"

A magazine entitled "The Ballers," No. 1

A magazine entitled "Psychedelic"

A 200' color film

A 1200' color film

A 16 millimeter 400' color film

A 16 millimeter 400' color film

An 8 millimeter 400' color film

The California Superior Court, Appellate Department, affirmed the trial court:

"We do not engage in the task of translating the motion pictures or the photographs into words. Suffice it to say that we have performed one duty (as properly suggested by appellants), and exercised our independent judgment with regard to each exhibit. We conclude that under the present state of the law as developed by Roth and subsequent cases, the evidence presented by the People (with the one exception hereinafter noted) was legally and factually sufficient to support the jury's findings of guilt. We find ample evidence to support the three principal requirements already noted, to wit:

'That 1. The dominant theme of the material taken as a whole appeals to a prurient interest in sex;

"2. The material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and

"3. The material is utterly without redeeming social value." "

Yet, this Court did reverse the conviction, without opinion provisions on *Redrup v. New York, supra*.

The Georgia Supreme Court in it's first decision issued on November 5, 1971 held that there was probable cause to believe that the films were obscene and the trial judge had erred in making a final adjudication of the merits of the case. Then it was pointed out to the Georgia Supreme Court by both the Prosecutor and Counsel for Petitioners, in their respective Petitions for Rehearing that the trial Court was authorized to make a final adjudication because the parties had stipulated that the hearing before the trial judge to be the final determination on this matter and that no further hearings were contemplated. When the Georgia Supreme Court was confronted with this oversight on their part which made their opinion clearly erroneous, they filed a revised opinion on November 18, 1971 to replace the one originally filed in which they characterized the films in this case as "hard core pornography." and held it unprotected by the First and Fourteenth Amendments to the U.S. Constitution.

After filing their revised opinion, on November 18, 1971, they did on the same date deny both the Motions for Rehearing filed by Counsel for both sides. The original opinion, and the revised or corrected opinions of this Court are set forth in the Appendix.

It would appear that the Georgia Supreme Court when confronted with the first case in its history, where the trial judge after considering all the evidence and law in the case found the publications not obscene, could not leave the lower court decision standing and undertook on its own to rule the motion picture film obscene in the constitutional sense in the complete absence of any evidence in the trial record or in the briefs and argument before it on which to base such highly unusual reversal of the said trial court. The only affirmative evidence adduced by the prosecution was that the Paris Adult Theatre I and II exhibited to adults only, no minors permitted on the premises and that a modest but polite forewarning was on the door to prevent potential intrusion into the privacy of unsuspecting adults who wished to avoid confrontation with erotic materials. Further, the only evidence before the trial Court and Supreme Court of Georgia demonstrated that there was no *Ginzburg*-type pandering involved in this case.

It would be time-consuming and fruitless to detail each and every case that has appeared before the Court after that time, but it is significant to note a trend developed, which found fruition in 1967 in the case of *Redrup v. New York*, 386 U.S. 767 (1967). For the first time, it became relatively clear what the Court meant when in *Roth* it made the reference to need to prevent erosion in the First Amendment rights by Congress or by the state to permit intrusion or encroachment only when necessary to prevent encroachment upon more important interests, when the Court, in its *per curiam* opinion, held the materials before it could not be said to be obscene in the constitutional sense. Thereafter, the Court laid down a suggested criteria for balancing the determination of whether material could be said to be obscene with the emphasis on the manner of dissemination, rather than on the object of dissemination.

The Court, in essence, suggested that where there was no evidence of sales to minors under state statutes reflecting a specific and limited concern for juveniles, nor where there was any dissemination or attempt at dissemination in a manner calculated to intrude into the privacy of an unwilling individual who wanted to avoid confrontation with this kind of material, or where there was no evidence of the type of "pandering" which the Court had seen significant in the case, *Ginzburg v. United States*, 383 U.S. 463 (1966), that no obscenity conviction or suppression could follow. Thereafter, the Court has reversed some thirty-three (33) cases, representing a wide cross-section from both federal and state, inferior and appellate courts, involving both criminal and civil condemnations, and the Court, in reversing these cases, cited only as its authority *Redrup v. New York*, *supra*. The cases reversed are: *Austin v. Kentucky*, 386 U.S. 767 (1967); *Gent v. Arkansas*, 386 U.S. 767 (1967); *Ratner v. California*, 388 U.S. 442 (1967); *Cobert v. New York*, 388 U.S. 443 (1967); *Keney v. New York*, 388 U.S. 440 (1967); *Friedman v. New York*, 388 U.S. 441 (1967); *Aday v. United States*, 388 U.S. 447 (1967); *Avansino v. New York*, 388 U.S. 446 (1967); *Sheperd v. New York*, 388 U.S. 444 (1967); *Corinth Publications, Inc. v. Wesberry*, 388 U.S. 448 (1967); *Books, Inc. v. United States*, 388 U.S. 449 (1967); *Mazes v. Ohio*, 388 U.S. 453 (1967); *Schackman v. California*, 388 U.S. 454 (1967); *Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Central Magazine Sales, Ltd. v. United States*, 389 U.S. 50 (1967); *Potomac News Co. v. United States*, 389 U.S. 47 (1967); *Conner v. City of Hammond*, 389 U.S. 48 (1967); *Chance v. California*, 389 U.S. 89 (1967); *I.M. Amusement Corporation v. Ohio*, 389 U.S. 573 (1968); *Robert-Arthur Management Corp. v. State of Tennessee*, 388 U.S. 578 (1968); *Felton v. City of Pensacola*, 390 U.S. 340 (1968); *Henry v. State of Louisiana*, 392 U.S. 655 (1968); *Carlos v.*

New York, 396 U.S. 119 (1969); *Cain v. Kentucky*, 397 U.S. 319 (1970); *Bloss v. Dykema*, 398 U.S. 278 (1970); *Walker v. Ohio*, 398 U.S. 434 (1970); *Hoyt, et al. v. State of Minnesota*, 399 U.S. 524 (1970); *Childs v. Oregon*, 401 U.S. 1006 (1971); *Bloss v. Michigan*, 402 U.S. 938 (1971); *Burgin v. South Carolina*, 404 U.S. 806 (1971); *Wiener v. California*, 404 U.S. 988 (1971), *Hartstein v. Missouri*, 404 U.S. 988 (1971).

In none of the motion pictures involved, in none are there explicitly depicted sexual intercourse, fellatio, cunnilingus, or oral intercourse. The motion picture films are comparable to the matter depicted in *Burgin v. South Carolina*, *supra*; *Bloss v. Dykema*, *supra*; and *Wiener v. California*, *supra*.

From the rationale of the holdings of this Court, it is suggested that five very important principles emerge.

First, that "girlie" pictures and magazines of nude females in various poses as well as pictures and magazines of nude males and male and female, male and male, female and female, are not obscene in the constitutional sense absent the graphic depiction of explicit sexual acts.

The second principle is that all literary publications containing story lines illustrated or non-illustrated hard-cover or paperback are protected expression and conversely are not obscene in the constitutional sense.

The third principle is that pictorial portrayal on motion picture film of nudes either male or female together with suggested sexual congress or suggested variant sexual acts constitute protected expression under the *First Amendment*

absent actual depiction of these acts where no imagination is required to see the acts in progress, and where no pretense of artistic (social) value is demonstrated. That is, mere body movement or vocal utterances and the like, separate and combined, do not suffice to meet the test of obscenity. The film must show actual insertion or genital travel in the actual act of intercourse or sodomy, or actual act of cunnilingus or fellatio, absent a pretence of artistic (social) merit.

The fourth principle, and probably the most important, is that if the particular material meets the proscribable tests as set forth heretofore there may still be valid consideration sufficient to encompass the material under the protective umbrella of the *First Amendment* freedoms. This principle, often times referred to as "redeeming social value," is that the act performs a purpose within the context of the material and the work conveys an idea or attempts to convey an idea for the creator or to the recipient. Therefore, if in fact there is a modicum of redeeming social value, the materials may not be proscribed.

The fifth principle lies in the manner of dissemination. Where materials are disseminated to willing adults in an adults-only environment, i.e., "adults only theatre" or "adults only bookstores" and not pandered or foisted upon an individual wishing to avoid confrontation with it or disseminated to juveniles, the materials are not proscribable.

Under controlling decisions of this Court, the motion picture films herein involved are not obscene in the constitutional sense, especially where, as here, none of the factors deemed important in *Redrup v. New York, supra*, are present.

2. THERE CANNOT BE A CONSTITUTIONALLY VALID JUDICIAL DETERMINATION OF OBSCENITY AS TO EACH OF THE FILMS BROUGHT BEFORE THE SUPREME COURT, CONSISTENT WITH PETITIONERS' RIGHTS TO PROCEDURAL AND SUBSTANTIVE DUE PROCESS REQUIRED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, IN THE ABSENCE OF ANY AFFIRMATIVE AND CONVINCING EVIDENCE ON EACH OF THE CONSTITUTIONALLY RELEVANT ELEMENTS OF THE STANDARDS FOR JUDGING PROSCRIBABLE OBSCENITY UNDER THE FIRST AMENDMENT.

Since obscenity prosecutions or injunctive proceedings, as in this case, are in themselves fraught with vagueness, the courts have held that in such prosecutions or proceedings, undertaken under a constitutionally permissible basis, the prosecution or in this case, the State of Georgia, has the affirmative responsibility to adduce appropriate evidence to establish each element of its concept of obscenity, including contemporary community standards.

In the state trial court below, the State of Georgia did not introduce a scintilla of evidence on the constitutionally required elements of obscenity. The State simply placed the instant films into evidence and then rested its case. The Georgia Supreme Court thereby condemned these films without any affirmative evidence of obscenity. The censorship of press materials without affirmative evidence, other than the films themselves, is no more than a misuse of the doctrine of *res ipsa loquitur*. This is error and a severe violation of *First*

Amendment rights. The following demonstrates the vital need for requiring affirmative evidence by the censor in all obscenity cases.

Recently, the Fifth Circuit Court of Appeals squarely faced the difficulties of protecting *First Amendment* freedoms in Federal obscenity prosecutions, where the Government merely put books into evidence and rested its case, without affirmative evidence on the elements of obscenity. In *U.S.A. v. Groner*, No. 71-1091 (Slip Opinion of January 11, 1972 — now pending EN BANC determination), the Fifth Circuit reversed a district court conviction for using a common carrier in interstate commerce to transport a quantity of alleged obscene books, in violation of 18 U.S.C. §1462:

"There remains little doubt that this Court is obligated to make an independent evaluation on the issue of whether the material in question is obscene. The issue of obscenity involves the application of first amendment rights to the printed word. The courts, not the reasonable jury or even the majority of reasonable men, are responsible for the protection of freedom of speech. The substantial evidence test, usually employed to reinforce jury verdicts, thus cannot be utilized to apply these constitutional doctrines."

"We have little trouble in finding the books involved in the instant case to be vile, filthy, disgusting, vulgar, and, on the whole, quite uninteresting. We do, however, have difficulty in equating these adjectives with the constitutional definition of obscenity."

"Knowing the legal test for obscenity and applying the same in light of recent Supreme Court decisions, however, are two entirely different matters. We are

completely incapable of applying the test in the instant case. Without some guidance, from experts or otherwise, we find ourselves unable to apply the *Roth* standard with anything more definite or objective than our own personal standards of prudence and decency, standards which should not and cannot serve as a basis for either denying or granting first amendment protection to this or any other literature.

"Jurors in an obscenity case are called upon to determine contemporary community standards and must then compare the materials in question to determine whether they go 'substantially beyond the limits of candor' in describing sex or nudity. Each juror is an individual—separate in his morals, experience and taste. The only standards which govern his conduct and his judgment are his own, not those of the community as a whole, whether state-wide or national. Although such unfettered discretion is acceptable in determining questions of negligence, probable cause and intent, it has no place in determining whether material is to be armed with first amendment protection. We can come to no other conclusion under the circumstances.

"This Court finds itself in the same position as that of the jury in such a case. We cannot take judicial notice, without even a scintilla of evidence, of what constitutes the community standard of decency at this or any other time. If such a standard exists at all, we would expect that it would be in a constant evolutionary and even revolutionary flux, the fact of which militates against our exercising uninformed judgment at any particular point in time. At best it would be a matter of pure chance as to whether we as a Court, or an individual's left to our own devices and without the aid of evidence, could determine the correct standard.

"Moreover, we think evidence of the materials' prurient appeal was necessary. The material in the instant case does not appeal to the prurient interests of this Court. Indeed, we have trouble imagining its appealing to the prurient interests of any normal, sane, healthy individual. It is just too disgusting and revolting to be so classified. *To allow a case to go to a jury of layman under such circumstances is to invite the jurors' equating patent offensiveness with prurient appeal and aiding suppression simply on the basis of speculation and suspicion about the prurient appeal of material to some known, undefined person whose psyche is not known. The possibility, even the probability, that jurors would be uncommonly sanctimonious or Puritanical in such a state of affairs should be obvious to anyone who has noted the numerous defeats of jury censors at the hands of the appellate courts.*

"We wish to make it perfectly clear what we hold, and what we fail to hold today in the instant case. We have expressed no opinion on the issue of whether the material involved here is or is not obscene. *In fact, our inability to do so is the basis for our holding that expert testimony is required on the elements of obscenity in order to furnish juries and this Court with an objective basis for deciding on the issue of first amendment rights.*" *United States v. Groner, supra*, (Slip Opinion).

In *Groner*, the Fifth Circuit held that the "lowest common denominator", Slip Op., P. 5, n. 4, to be applied in determining whether material involved in an obscenity prosecution are obscene and constitutionally unprotectable are:

- "1. Whether the materials, taken as a whole, appeal primarily to the prurient interests of the average adult [*Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304 (1957)];

Whether the materials are patently offensive because they go substantially beyond the customary limits of candor in their description of sex and nudity [*Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 82 S.Ct. 1432 (1962)];

Whether the materials are utterly without redeeming social value [*Jacobellis v. Ohio*, 378 U.S. 184, 84 S.Ct. 1676 (1964)]."

(Emphasis and authorities added)

(Slip Op., p. 5).

The application of the entire *Roth* progeny does not permit that "the constitutional status of the material be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance", *Jacobellis v. Ohio*, 378 U.S. 184, 191, and the "three elements must coalesce", *Memoirs v. Massachusetts*, 383 U.S. 413, 86 S.Ct. 975, 977 (1966), to be established. See also, *Redrup v. New York*, 386 U.S. 767, 87 S.Ct. 1414. The second rule of the *Roth* progeny, i.e., are the materials patently offensive because they go substantially beyond the customary limits of candor in their description of sex and nudity, has been expressed as the "contemporary community standards" aspect of the *Roth* progeny in *Manual*, 370 U.S. at 488, and *Jacobellis*, 378 U.S. at 192. See also, *United States v. Kennerly*, 209 F. 119, 121 (D.C.S.D. N.Y. 1913), when Judge Learned Hand first expressed the concept of "contemporary community standards", where he said:

"* * * If there be no abstract definition, such as I have suggested, should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? * * *"

(Emphasis added).

Manual, supra, was a case involving a ruling of the United States Post Office Department that barred from the mails a shipment of magazines; such ruling was based on alternative determinations that the magazines were nonmailable under two separate provisions of 18 U.S.C. §1461, a federal criminal statute, because the magazines (1) were themselves "obscene", and (2) gave information as to where obscene matter could be obtained, 370 U.S. at 479. *Manual* set forth the requirement that the contemporary community standards, which the materials patent offensiveness must go substantially beyond, is that of the "national" community. Justice Harlan announced the judgment of the Court, and Justice Stewart joined in the opinion. Justice Harlan, speaking with reference to the "contemporary community standards" aspect of the constitutional test of obscenity, pointed out that:

"There must first be decided the relevant 'community' in terms of whose standards of decency the issue must be judged. *We think that the proper test* under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, *is a national standard of decency*. We need not decide whether Congress could constitutionally prescribe a lesser geographical framework for judging this issue which would not have the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency. Cf. *Butler v. Michigan*, 352 U.S. 380, 77 S. Ct. 524, 1 L.Ed. 2d 412." *Manual Enterprise, Inc. v. Day, supra*, at 488. (Emphasis supplied)

It would appear that Justice Harlan applied a "national contemporary community standards" test to those cases

involving an attempt at governmental censorship of materials under the purported authority of a federal statute, but *Jacobellis* clarified Justices Harlan and Stewart's position by mandating that a "national community" be the test of the "contemporary community standards" in any obscenity litigation. In *Jacobellis*, Justice Brennan announced the judgment of the Court and delivered an opinion in which Justice Goldberg joined. Justice Brennan wrote that any suggestion that the "contemporary community standards" aspect of the *Roth* test was to be determined by the standards of the particular local community, from which the case arose, was "an incorrect reading of *Roth*." (378 U.S. 192). In reaffirming *Roth's* position to the effect that when determining the constitutional status of whether an allegedly obscene work offends "contemporary community standards", the basis of such a determination must be that of a "national standard", Justice Brennan said, 378 U.S. at 195:

"It is, after all, a national constitution we are expounding."

This rationale is extremely logical and is required by the "Due Process of Law" concept under the Constitution of the United States, as exemplified by the following language of Justice Brennan in *Jacobellis*:

"It is true that local communities throughout the land are in fact diverse, and that in cases such as this one the Court is confronted with the task of reconciling the rights of such communities with the rights of individuals. Communities vary, however, in many respects other than their toleration of alleged obscenity, and such variances have never been considered to require or justify a varying standard for

application of the Federal Constitution. The Court has regularly been compelled, in reviewing criminal convictions challenged under the Due Process Clause of the Fourteenth Amendment, to reconcile the conflicting rights of the local community which brought the prosecution and of the individual defendant. Such a task is admittedly difficult and delicate, but it is inherent in the Court's duty of determining whether a particular conviction worked a deprivation of rights guaranteed by the Federal Constitution. The Court has not shrunk from discharging that duty in other areas, and we see no reason why it should do so here. The Court has explicitly refused to tolerate a result whereby 'the constitutional limits of free expression in the Nation would vary with state lines,' *Pennekamp v. Florida*, supra, 328 U.S. at 335, 66 S.Ct., at 1031, we see even less justification for allowing such limits to vary with town or county lines . . . " (378 U.S. at 194-195).

Thus there is no question that the "national contemporary community standards" is the proper framework of reference within which the determination that the materials are "patently offensive" must be made.

The foregoing discussion concerns itself with the evolvement of the constitutional standards for determining the obscenity of any material by employing "the lowest common denominator", i.e., the *Roth* test, which the Fifth Circuit in *Groner* recognized as being the viable law in the "obscenity" area. The *Groner* Court, in pronouncing *Roth* as the test in the "obscenity" cases, recognized that:

"Knowing the legal test for obscenity and applying the same in light of recent Supreme Court decisions, however, are two entirely different matters.***." (Slip Op., p. 6).

In *Groner*, the Court recognized that the *Roth* test cannot be correctly applied to any case by merely looking at the materials involved in relation to the language of the test of *Roth*. The *Roth* standards for judging "obscenity" are imprecise and inherently vague. Perhaps the most striking evidence of the truth of such a statement are the statements of various members of the Supreme Court itself with respect to their own inability to comprehend the meaning of the criteria enunciated by the Court.

In *Ginzburg v. United States*, 383 U.S. 463, 478-481, Justice Black made the following cogent observations:

"...I think that the criteria declared by a majority of the Court today as guidelines for a court or jury to determine whether Ginzburg or anyone else can be punished as a common criminal for publishing or circulating obscene material are so vague and meaningless that they practically leave the fate of a person charged with violating censorship statutes to the unbridled discretion, whim and caprice of the judge or jury which tries him. I shall separately discuss the three elements which a majority of the Court seems to consider material in proving obscenity.

"(a) The first element considered necessary for determining obscenity is that the dominant theme of the material taken as a whole must appeal to the prurient interest in sex. It seems quite apparent to me that human beings, serving either as judges or jurors, could not be expected to give any sort of decision on this element which would even remotely promise any kind of uniformity in the enforcement of this law. What conclusion an individual, be he judge or juror,

would reach about whether the material appeals to 'prurient interest in sex' would depend largely in the long run not upon testimony of witnesses such as can be given in ordinary criminal cases where conduct is under scrutiny, but would depend to a large extent upon the judge's or juror's personality, habits, inclinations, attitudes and other individual characteristics. In one community or in one courthouse a matter would be condemned as obscene under this so-called criterion but in another community, maybe only a few miles away, or in another courthouse in the same community, the material could be given a clean bill of health. In the final analysis the submission of such an issue as this to a judge or jury amounts to practically nothing more than a request for the judge or juror to assert his own personal beliefs about whether the matter should be allowed to be legally distributed. Upon this subjective determination the law becomes certain for the first and last time.

“(b) The second element for determining obscenity as it is described by my Brother BRENNAN is that the material must be ‘patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters.’” Nothing that I see in any position adopted by a majority of the Court today and nothing that has been said in previous opinions for the Court leaves me with any kind of certainty as to whether the ‘community standards’ referred to are world-wide, nation-wide, section-wide, state-wide, country-wide, precinct-wide or township-wide. But even if some definite areas were mentioned, who is capable of assessing ‘community standards’ on such a subject? Could one

expect the same application of standards by jurors in Mississippi as in New York City, in Vermont as in California? So here again the guilt or innocence of a defendant charged with obscenity must depend in the final analysis upon the personal judgment and attitudes of particular individuals and the place where the trial is held. And one must remember that the Federal Government has the power to try a man for mailing obscene matter in a court 3,000 miles from his home.

"(c) A third element which three of my Brethren think is required to establish obscenity is that the material must be 'utterly without redeeming social value.' This element seems to me to be as uncertain, if not even more uncertain, than is the unknown substance of the Milky Way. If we are to have a free society as contemplated by the Bill of Rights, then I can find little defense for leaving the liberty of American individuals subject to the judgment of a judge or jury as to whether material that provokes thought or stimulates desire is 'utterly without redeeming social value. ***' Whether a particular treatment of a particular subject is with or without social value in this evolving, dynamic society of ours is a question upon which no uniform agreement could possibly be reached among politicians, statesmen, professors, philosophers, scientists, religious groups or any other type of group. A case-by-case assessment of social values by individual judges and jurors is, I think, a dangerous technique for government to utilize in determining whether a man stays in or out of the penitentiary.

"My conclusion is that certainly after the fourteen separate opinions handed down in these three cases today no person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the area of 'obscenity' as that term is confused by the Court today."

In *Memoirs v. Massachusetts*, 383 U.S. 413, 453, Justice Harlan stated: "The central development that emerges from the aftermath of *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, is that no stable approach to the obscenity problem has yet been devised by this Court."

Chief Justice Warren stated in *Jacobellis v. Ohio*, 378 U.S. 184, 199-200:

"Recently this Court put its hand to the task of defining the term 'obscenity' in *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498. The definition enunciated in that case has generated much legal speculation as well as further judicial interpretation by state and federal courts. It has also been relied upon by legislatures. Yet obscenity cases continue to come to this Court, and it becomes increasingly apparent that we must settle as well as we can the question of what constitutes 'obscenity' and the question of what standards are permissible in enforcing proscriptions against obscene matter.

• • •

"We are told that only 'hard core pornography' should be denied the protection of the First Amendment. But who can define 'hard core pornography' with any greater clarity than 'obscenity'? And even if we were to retreat to that position, we would soon be faced with the need to define that term just as we now are faced with the need to define 'obscenity.'"

In *Jacobellis, supra*, at 197, Justice Stewart stated:

"It is possible to read the Court's opinion in *Roth v. United States* and *Alberts v. California*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed.2d 1498, in a variety of ways. In saying this, I imply no criticism of the Court, which in those cases was faced with the task of trying to define what may be indefinable. I have reached the conclusion which I think is confirmed at least by negative implication in the Court's decisions since *Roth* and *Alberts*, that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."

Even the trial judge below had extreme difficulty in his attempt to apply the imprecise and inherently vague standard for judging "obscenity". The State put on *no* affirmative evidence on the elements of obscenity; while Petitioner called a properly qualified expert witness (A. 65-83), who testified

that the films did not appeal to a "prurient interest" and did have redeeming social value. No evidence was ever presented on community standards. The confusion of the trial judge is best exemplified by his Order:

"Assuming that obscenity is established by a finding that the actors cavorted about in the nude indiscriminately, then these films may fairly be considered obscene. Both films are clearly designed to entertain the spectator and perhaps, depending on the viewer, to appeal to his or her prurient interest. The portrayal of the sex act is undertaken; but the act itself is consistently only a simulated one if, indeed, the viewer can assume an act of intercourse or fellatio is occurring from the machinations which are portrayed on the screen. Each of the films is childish, unimaginative, and altogether boring in its sameness.

It appears to the Court that the display of these films in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible.

IT IS THE JUDGMENT OF THIS COURT THAT the films, even though they display the human body and the human personality in a most degrading fashion, are not obscene."

(A. 33-34) (Emphasis supplied.)

It is apparent that Judge Etheridge had extreme difficulty in understanding the tests for obscenity and then applying them to this case. His solution was one that should be of some assistance to this Court: He found the films not obscene, because the conduct and method of commercial

distribution was protected, and there was adequate notice to the public, with "reasonable protection against exposure of these films to minors". In effect, Judge Etheridge found that:

"The display of any sexually oriented films in a commercial theatre, when surrounded by notice to the public of their nature and by reasonable protection against exposure of the films to juveniles, is constitutionally protected."

(This Court's Inquiry.)

It is clear that the same difficulty of discerning the meaning of the standards for judging "obscenity" exists in the academic world among law professors, legal writers, and law students throughout the Nation. In a very important sense, the bridge between judicial action and law students and lawyers lies in the extensive discussions which appear in the legal journals. In the case of the definition of "obscenity", the legal commentators have simply been unable to make any intelligent analysis of the standards and criteria for judging "obscenity". "The constitutional problems are primarily of two kinds. The first revolves around the ambiguity of the term 'obscenity' ... It may be possible to distinguish between degrees of explicitness in discussions of sex, but among explicit discussions of sex it is heroic to attempt to distinguish the good from the bad." Kalven, "The Metaphysics of the Law of Obscenity", 1960 Sup. Ct. Rev. 1, 2-3. "Not only do the cases between 1957 and 1965 demonstrate the difficulty of defining obscenity as the appeal to prurient interest, but they reveal that *Roth v. United States*, spawned a menagerie of vital subsidiary questions ... The questions seem endless and many seem unanswerable ... Another way to describe the fruits of the Supreme Court's labors in the vineyard of obscenity law is that it has produced five separate

and contradictory tests... The Court has turned the law of obscenity into a constitutional disaster area." Magrath, "The Obscenity Cases: Grapes of Roth," 1966 Sup. Ct. Rev. 7, 23, 56, 58. "We are driven to the conclusion that the verbal formula for obscenity approved by the Court in the *Roth-Alberts* opinion is not a single formula at all but one that embraces all of the current definitions of obscenity, including that of the Model Penal Code.... These applications of whatever concept of obscenity the Justices have in mind suggest only what, in the minds of the Justices, obscenity is not; they tell us little of what the Justices think obscenity is." Lockhart and McClure, "Censorship of Obscenity: The Developing Constitutional Standards", 45 Minn.L.Rev. 5, 58-59 (1960).

The academic commentators are virtually all in the same vein. "There are few areas of constitutional law more confusing to lawyers and laymen than obscenity censorship.... The confusion of the Justices was mirrored throughout the country in the plight of individuals and of public officials who had to live and work with the law." Morreale, "Obscenity: An Analysis and Statutory Proposal", 1969 Wisc.L.Rev. 421, 430. "Confronted with first amendment limitations, the Supreme Court has tried to distinguish regulatable from nonregulatable sexually-gratifying communication by censorious definitions that are inconsistent with each other and with first amendment values." Ratner, "The Social Importance of Prurient Interest-Obscenity Regulation v. Thought-Privacy", 42 So. Calif.L.Rev. 587 (1969). "The Court's definition of obscenity has caused problems because it has put the Court in the role of the nation's Super Censor. The judgments entailed in using the Court's definition are so subjective that it is virtually impossible for the lower courts to apply it with anything approaching uniformity." Karre, "Stanley v. Georgia: New Directions in Obscenity

Regulation?", 48 Tex.L.Rev. 646, 647 (1970). "The ultimate board of censors in the United States is the United States Supreme Court. Of course, there are millions of *ex officio* members that search the bookshelves and movie houses of the United States every day guarding the moral virtue of young and old alike. They do not know how to define 'obscenity,' but they know it when they see it. The Supreme Court in all honesty and with a great deal of pain and candor has labored for a definition of that perfidious word 'obscenity' and have 'white-washed' a nebulous concept that the masses are to use in their search." Carpenter, "Walton's Castle: The Spectrum of 'I Am Curious-Yellow'", 10 Washburn L.J. 163, 164 (1970). "Determining what is obscene today is virtually as uncertain a task as it was prior to *Roth*." Eich, "From Ulysses to Portnoy: A Pornography Primer", 53 Marq.L.Rev. 155, 165 (1970). "The tests which have evolved are not clear-cut; it appears that a majority of the Supreme Court has yet to agree upon a single definition of 'obscenity.'" Dunaj, "Private Possession of Obscene Films Where There is No Intent to Sell, Circulate or Distribute," 24 U.Miami L.Rev. 179, 180 (1969). "But aside from the questions about the constitutional soundness of the obscenity definition in *Roth-Alberts*, there is the additional problem raised by the meaning of that definition. Stripped of its rhetoric, the *Roth* definition appears to signify merely that a work will be legally obscene if the triers of fact — the jury or the judge — decide that in their opinion it is obscene. The fact of the matter is that obscenity is probably one of those concepts inherently incapable of meaningful definition." Kanowitz, "Love Lust in New Mexico and The Emerging Law of Obscenity", 10 Natural Resources J. 339, 344 (1970).

Because of the lack of unintelligible standards and criteria for judging "obscenity", prosecutors, police officers, the press,

the public, and even judges, have approached issues of "obscenity" subjectively, moralistically, and emotionally, rather than scientifically and objectively. The vagueness, ambiguity and uncertainty of the standards have led to lawlessness in the enforcement of the law by public officials and censorial activities by private organizations, which have caused direct and immediate harm to many individuals throughout the country. Moreover, this has led to deprivation of large segments of the population of the right of access to books, films, magazines, and other media of communication.

In *Groner*, the Court correctly recongized the morass of legal confusion in applying the *Roth* test's imprecision and inherent vagueness to materials without the aid of expert testimony, as exemplified by their holding that:

"... Without some guidance, from experts or otherwise, we find ourselves unable to apply the *Roth* standard with anything more definite or objective than our own personal standards of prudence and decency, standards which should not and cannot serve as a basis for either denying or granting first amendment protection to this or any other literature."

(Slip Op., p. 6).

The same principle was enunciated in *United States v. Klaw*, 350 F.2d 155 (2 Cir. 1965), where the Second Circuit, recognizing that the defendant, out of apparent necessity, had made no claim that the material in question had any redeeming social, artistic or literary value whatsoever, nevertheless held that the lack of expert testimony on the

issues of prurient appeal and community standards was fatal to the prosecution.

Other courts have struggled with this problem of the need for affirmative evidence, as demonstrated by the following quotations:

(a) In *Re Giannini*, 72 Cal. Rptr. 655 (1968) the Supreme Court of California stated in pertinent part:

"We conclude the convictions must be set aside because the prosecution failed to introduce any evidence of community standards either that Isler's conduct appealed to prurient interest or offended contemporary standards of decency... To sanction convictions without expert evidence of community standards encourages the jury to condemn as obscene or offensive to the particular juror... We conclude that the judgment must be vacated for lack of evidence as to whether applying contemporary community standards petitioner Isler's dance appealed to the prurient interests of the audience and offended accepted standards of decency."

(b) The Supreme Court of the Commonwealth of Virginia likewise has held in the case of *House v. Commonwealth*, 169 S.E.2d 572 (1969), reported on September 5, 1969, on this issue as follows:

"In the first place there is no evidence that according to or applying contemporary community standards the dominant theme of the magazines in question appealed the prurient interest of the reader or that they were patently offensive because they affronted contemporary community standards relating to the

description or representation of sexual matters. That is, there is no evidence that these publications were offensive because they affronted contemporary community standards relating to the description of such matters.

As to the sufficiency of the evidence, we agree with the defendant that since the statute provides punishment for every person who knowingly . . . commercially distributes . . . any obscene matter, the burden was on the Commonwealth to show that the magazines were obscene and that the defendant knew they were obscene when he distributed them to retail dealer Sweraky . . . In accord with this view we hold that in the absence of evidence that these magazines affronted the standards of the community, the evidence on behalf of the Commonwealth was insufficient to sustain the conviction of the defendant."

(c) The Supreme Court of the Commonwealth of Pennsylvania recently considered this issue in *Duggan v. Guild Theatre, Inc., et al*, 258 A.2d 865 (1969), and said in pertinent part as follows:

"Nor has the district attorney proved that this movie 'affronts contemporary community standards' relating to the representation of sexual matters. Each one of his witnesses called to testify as to community standards admitted that they had no idea what these standards were. The district attorney in his brief admits that he produced no expert testimony on this issue, yet urges us to find that the movie affronts contemporary standards. This we cannot do. Courts of law are not capable of deciding what

contemporary standards are, without the benefit of any evidence whatsoever. Cf. *Dell Publications*, 427 Pa. at 193, 223 A.2d at 843.

"As for the third independent test, the district attorney has not proved 'Therese and Isabelle' to be utterly without redeeming social value

"Thus the Commonwealth has not shown, under any one of the three independent standards set forth in *Memoirs* and *Dell Publications* that 'Therese and Isabelle' is constitutionally obscene."

(d) *Spelser v. Randall*, 357 U.S. 513, 2 L.Ed.2d 1460, 78 S.Ct. 1332:

"Where the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the State bear the burden of persuasion to show that the appellants engaged in criminal speech. Cf. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 1 L.Ed. 2d 1469, 77 S.Ct. 1325, *supra*.

"The vice of the present procedure is that, where particular speech fails to close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, cf. *Dennis v. United States*, 341 U.S. 494, 95 L.Ed. 1137, 71 S.Ct. 857, *supra*, provide but shifting sands on which the litigant must maintain his position."

(e) *Smith v. California*, 361 U.S. 147, 4 L.Ed.2d 205, 80 S.Ct. 215, concurring Opinion of Justice Frankfurter:

"...[F]or community standards or the psychological or physiological consequences of questioned literature can as a matter of fact hardly be established except through experts. Therefore, to exclude as irrelevant evidence that goes to the very essence of the defense and therefor to the constitutional safeguards of due process. The determination of obscenity no doubt rests with judge or jury. Of course the testimony of experts would not displace judge or jury in determining the ultimate question whether the particular book is obscene, any more than the testimony of experts relating to the state of the art in patent suits determines the patent ability of a controverted device.

"There is no external measuring rod for obscenity. Neither, on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges. Since the law through its functionaries is 'applying contemporary community standards' in determining what constitutes obscenity, *Roth v. United States*, 354 U.S. 476, 489, 1 L.Ed.2d 1498, 1509, 77 S. Ct. 1304, it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those 'contemporary community standards' are. There interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge. It bears repetition that the determination of obscenity is for juror or judge not on the basis of his personal [sic] upbringing or restricted reflection or particular experience of life, but on the basis of 'contemporary

community standards.' Can it be doubted that there is a great difference in what is to be deemed obscene in 1959 compared with what was deemed obscene in 1859?"

(f) *People v. Rosakos*, 74 Cal. Rptr. 34 at 36 (1968):

"This case must be reversed for a second reason, which is the holding in *In re Giannini and Iser*, 69 A.C. 588, 72 Cal. Rptr. 655, 446 P. 2d 535.

"In that case the court was dealing with violations of Penal Code Section 314, subdivision (1) and Penal Code Section 647, subdivision (a). (The alleged offenses occurred in the presentation of a dance before an audience. The court in that case affords the dance *First Amendment* protection unless the dance is obscene. In order to determine whether or not the dance was obscene the court holds at page 599, 72 Cal. Rptr. at page 662, 446 P.2d at page 542, . . . a finding of offensiveness to the accepted community standards of decency forms a prerequisite to a conclusion of obscenity,' and the court further states at pages 599-600, 72 Cal. Rptr. at page 663, 446 P.2d at page 543:

"Relying principally on the well established doctrine that jurors should not be endowed with the prerogative of imposing their own personal standards as the test of criminality of conduct, we hold that expert testimony should be introduced to establish community standards.

"We cannot assume that jurors in themselves necessarily express or reflect community standards; we must achieve so far as possible the application of an objective, rather than a subjective, determination of community standards.

"(2) In the case at bar no evidence of community standards was introduced. We therefore hold that the evidence is insufficient on the present record to sustain the conviction as to count VII.

"The judgment is reversed."

(g) *United States v. Klaw*, 350 F.2d 155 (1965):

"Nor is mere 'patent offensiveness' enough. There must in addition be the requisite prurient appeal. Assuming that 'prurient appeal' can be adequately defined, there are still some questions: appeal to whose prurient interest? judge by whom? on what basis? For example, is it the 'average person' who applies 'contemporary community standards' to determine if the 'dominant theme' appeals to 'prurient interest' (of someone)? Or is it someone else applying 'contemporary community standards' to determine that the 'dominant theme' appeals to 'prurient interest' of the 'average person'? Do 'contemporary community standards' operate to reduce potential prurient appeal? Or do they operate to establish that some 'redeeming social importance' is present? Or do they operate to measure the 'patent offensiveness' of an excess of candor? Again, does the 'dominant theme' indicate that the prospective prurient appeal is great or slight, or does it suggest that other themes will supply the redeeming social importance? Perhaps the *Roth* statement is too compact—an unsurprising failing in an initial formulation, the Court itself has acknowledged that it 'is not perfect.' *Jacobellis v. Ohio*, *supra*, 378 U.S. at 191, 84 S.Ct. 1676. But the difficulties of articulating an adequate substitute need not dictate immutable adherence to such a will-o'-the-wisp.

"Having in mind the constitutional constrictions on the breadth of legislation affecting the freedom of expression, if appeal to prurient interest—on either an 'average man' or a 'deviant typical recipient' basis—is the statutory concern, then it seems desirable, indeed essential, that such appeal to someone be shown to exist. This the Government's view of *Roth* does not require. Nor should it be sufficient merely that the disseminator or publicizer things such appeal exists. The stimulation and reaction with which the 'obscenity' laws are concerned are unlikely to be a problem if the appeal is felt by none of the recipients, but only by the disseminator. While such a person may in some other ways be a potential problem for society, the 'obscenity' laws are concerned are unlikely to be a problem if the appeal is felt by none of the recipients, but only by the disseminator. While such a person may in some other ways be a potential problem for society, the 'obscenity' laws do not seem best calculated to cope with him. Moreover, the Court stresses in *Roth* the 'effect' of the material on the people reached by it. See 354 U.S. at 490, 77 S.Ct. 1304.

"...And if proof of prurient stimulation and response is generally important, it is particularly necessary when the prurient interest may be that of a deviant segment of society whose reactions are hardly a matter of common knowledge.

.....

"However, some proof should be offered to demonstrate such appeal, thereby supplying the fact finders with knowledge of what appeals to prurient interest so that they have some basis for their conclusion. As was observed earlier in *Klaw's* troubles

with the postal censors, 'obviously, the issue of what stirs the lust of the sexual deviate requires evidence of special competence.' *Klaw v. Schaffer, supra*, 151 F.Supp. at 539 n.6; see *Manual Enterprises, Inc. v. Day*, 110 U.S. App. D.C. 78, 289 F.2d 455 (1961, rev'd, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639 (1962)).

"In this case, although Judge Wyatt wisely suggested, and the Government considered, introduction of such evidence, there was none. Because of this Judge Wyatt stated at the end of the case, as he had to, that there was no 'evidence from which the jury could find that it (Nutrix materials) would in fact appeal to the prurient interest of a particular class.'

"Furthermore, nothing in the record shows that the material even has prurient appeal to the average man.

"... In this case, however, the only predicate for any conclusion about prurient appeal was the material itself, as if *res ipsa loquitur*. The jurors were, therefore, left to speculate. They were invited to behold the accused material and, in effect, conclude simply that it is undesirable, it is distasteful, it is disgusting. Knowing perhaps that they would not be interested in obtaining more of the material they might wonder why anyone else would, and conclude that the only answer is 'prurient appeal.'"

(h) *Commonwealth v. Dell Publications, Inc.*, 233 A.2d 840 (1967):

"In the instant litigation, however, both the comments made during the hearing and the formal adjudication indicate that the hearing judge proceeded on the premise that, in the final analysis, his own subjective reaction, and and by itself, was the

determining factor. As the law of obscenity now stands the judge's subjective analysis is of course relevant to the ultimate issue, but the mere donning of judicial robes does not make us the embodiment of the 'average person' nor do our tastes necessarily parallel those of the 'contemporary community.'

"The totally subjective approach adopted by the court below was palpable error.

"A. Appeal to Prurient Interest. This is perhaps the most difficult of the three elements to define. What appeals to the prurient interest of one individual may not appeal to the prurient interest of another. Some cases may pose a problem of group definition, but it is conceded that 'Candy's' appeal is to the community at large and thus we must judge its prurient appeal to the 'average person.'

"Unfortunately, there was practically no testimony offered concerning 'Candy's' appeal to the prurient interest of the average adult citizen.

"The Commonwealth presented practically no evidence whatsoever concerning 'Candy's' relationship to contemporary community standards."

(i) *Dunn v. Maryland State Board of Censors*, 213 A.2d 751 (1965):

"In the present instance the Board did no more than offer the film; it produced no other evidence whatever. We think it plain that save in the rare case where there could be no doubt that the film is obscene the Board will not meet the burden of persuasion imposed on it by the Constitution and the

statute without offering testimony that the picture is obscene in that (a) the average person, applying community standards, would find that its dominant theme, taken as a whole, appeals to prurient interests, (b) that the film goes substantially beyond customary limits of candor in description or representation of sex or other matters dealt with, and (c) that it is subject to proscription because it is utterly without redeeming social importance considered in light of the fact that "... sex and obscenity are not synonymous, *Roth*, U.S. 476, 487, 77 S.Ct. 1304, 1310, 1 L.Ed.2d 1498, 1508, and the fact that material dealing with sex in a manner that advocates ideas or has literary, scientific or artistic value or any other form of social importance may not be branded as obscenity. In our view, neither the judge who may sit in the circuit court to review the action of the Board nor the judges of this Court ordinarily would be qualified to determine whether a film exceeded these constitutional standards or tests without enlightening testimony on these points."

(j) *Hudson v. United States*, 234 A.2d 903 (1967):

"Where the material involved is not patently obscene, neither a judge nor twelve local jurors chosen at random are capable of determining the standards of tolerance prevalent in the nation generally without first being given some competent evidence of what those standards are. *United States v. Klaw*, 350 F.2d 155, 168 n. 14 (2d Cir. 1965). A guilty verdict in an obscenity trial should not be a legal expression of revulsion by the local community from which the jury is drawn. If a case is submitted to the trier of fact without first establishing the community standards by competent evidence to which the trier may refer, the verdict at best will be based on the

prevailing customs in a limited geographical area and, at worse, upon the 'subjective reflection of taste or oral outlook of individual jurors or individual judges....' [T]he determination of obscenity is for juror or judge, not on the basis of his personal upbringing or restricted reflection or the particular experience of life, but on the basis of 'contemporary community standards.' *Smith v. People of State of California*, 361 U.S. 147, 165, 80 S.Ct. 215, 225, 4 L.Ed.2d 205 (1959); concurring opinion of Mr. Justice Frankfurter. These standards must be established by relevant evidence at trial.

"Since the prosecution in the present case had the burden of proving relevant community standards prevailing in the nation generally and elected not to do so, we hold that the Government failed to establish an essential element of the crime charged and the verdicts of guilty were therefore in error."

See also *Ramirez v. State*, 430 P.2d 826 (1967), and *City of Phoenix v. Fine*, 420 P.2d 26 (1966).

"...[W]e reverse on the ground that the state has failed on any conceivable basis to prove its case. Here, as will be recalled, the only evidentiary predicate for the conclusion that the publications are obscene under any of the views expressed in Redrup are the publications themselves. Apparently, the prosecution believes that a theory [sic] akin to *res ipsa loquitur* applies to obscenity cases, and that no evidence other than the presentation of the magazines is required in order to establish a violation of the statutory and constitutional standards."

(k) And recently the Court of Special Appeals of Maryland in the matter styled *Woodruff v. State*, 237 A.2d 436, his Honor, Judge Moylan appropriately stated:

"In measuring then the prurient appeal of this theme, we must do so in terms of a particular audience. *There was no evidence in this case to indicate that, under Mishkin, it was 'designed for or primarily disseminated to a clearly-defined deviant sexual group.'* We must, therefore, measure prurience in terms of its appearance to the average person. (Emphasis added.)

.....

"It is axiomatic that to judge whether something offends contemporary community standards, one must know what those contemporary community standards are. In this case, the State neither showed nor offered any evidence whatsoever as to the standards prevailing in Prince George's County, the State of Maryland or the United States, whichever of those communities will ultimately be deemed the appropriate 'community.' *Jacobellis v. Ohio, supra*. By way of defense, the appellant did make two abortive attempts to offer testimony as to the prevailing community standards, at least within Prince George's County.

.....

"This failure of the trial court to afford the appellant an opportunity to prove what he believed to be the prevailing community standard is not material, however, in view of our belief that the State failed utterly to make even a *prima facie* showing of any community standard whatsoever. We feel, as did Judge Orth in his concurring opinion in *Dillingham v. State, supra*, 9 Md. App. at 715, 267 A.2d at 801:

'I cannot determine from the record whether or not the material affronts contemporary community standards relating to the description or representation of sexual matters. The State, as the opinion of the Courts points out, did not prove what the contemporary community standards are, either national or local.... It is not possible to determine that the material here affronted contemporary community standards when the standards themselves are not delineated. Thus, the second element was not proved and this alone would be good reason to reverse the conviction.'

.....

"In making our own independent, reflective judgment upon the material, we feel that the view expressed by Judge (now Chief Judge) Hammond in *Dunn v. Maryland State Board of Censors*, *supra*, 240 Md. at 255, 213 A.2d at 754, even though dealing with alleged obscenity in the context of motion picture censorship, is pertinent:

'In our view, neither the judge who may sit in the circuit court to review the action of the Board nor the judges of this Court ordinarily would be qualified to determine whether a film exceeded those constitutional standards or tests without enlightening testimony on these points.'

.....

"Even were the material before us obscene by any test, however, the conviction of the appellant here would have to be reversed because of the utter failure of the State to show any evidence of *scienter* on his part as required by *Smith v. California*."

The application of the *Roth* test by a trier of fact, either court or jury, to any given material, is an impossible task, when such application occurs only by introduction of the materials in question and a presentation of the *Roth* language in the charge of the Court, without any testimony as to the meaning of the language presented as related to the questioned materials. There must be expert testimony presented by the censor to make the language of the *Roth* test meaningful to the trier of fact.

The assertion, that the mere introduction of materials is the only evidence necessary to meet the *Roth* standard and satisfy its burden of proof, cannot be sustained in light of the foregoing authorities and logical reasoning as such relate to the imprecision of the *Roth* standard, *per se*, and application of the same by the trier of fact to any given material. A logical look at the different elements of the *Roth* test and the problems with having the trier of fact apply it in terms of the language to any material, without the aid of experts as to the meaning of such language, will support this contention:

First: A logical consideration of "whether the materials, taken as a whole, appeal primarily to the prurient interests of the average adult" element, and why expert testimony on this element is needed, is presented. *Roth* defined "prurient interest" as a "shameful or morbid interest in nudity, sex or excretion" (354 U.S. at 487, n.20). It is apparent that a "morbid or shameful interest" is different in each age group, *i.e.*, 20 years old vs. 60 years old, each ethnic group, each religious group, each economic-status group, etc., *ad infinitum*. Who can say that the materials "appeal primarily" to "prurient interest" (whatever that is)? What is a "morbid

or shameful interest", and how are we to know such an interest is even present in the "average adult" (once it is determined what physical, physiological, psychological, and emotional characteristics can be said to be that of an "average adult")? The writers are not qualified to answer these questions, and, as shown by the aforementioned authorities — legal, public and scholarly — which are, at best, contradictory in their terms as to the application and meaning of *Roth*, neither are the triers of fact; be they court or jury. The very basic problem is that lawyers, judges and jurors are not experts in the required fields of knowledge necessary to apply the imprecise and abstract standards of *Roth* to any given material. Only "experts", who have the expertise and knowledge necessary to give meaning to the abstract terminology of *Roth*, and the proper application of such to the materials in question, can supply the trier of fact with any sound, legal and logical bases upon which to reach a well-founded decision. Failure to provide such expert testimony is an invitation: (1) to allow the trier of fact to equate that which may be repugnant or distasteful to a particular individual with "prurient appeal" of an unknown psyche; (2) to allow jurors to become uncommonly sanctimonious or puritanical, albeit hypocritically in a number of instances, and suppress materials absent an objective basis to warrant this type of juror censorship; and (3) to allow prosecutors the right to obtain a conviction in a criminal case on a *res ipsa loquitur* theory by merely introducing the materials into evidence for the jury to peruse, thereby enabling each individual juror to use his own personal, subjective discretion, by mere speculation and suspicion, in deciding what is a "morbid, shameful interest in nudity, sex and excretion" of the average adult. Thus, expert testimony is

required as an essential part of the evidence necessary to establish the elements of obscenity, whether the materials in question deal with heterosexual activities or activities of a deviant sexual group, such evidence being the only method of providing an *objective* basis, rather than a *subjective* one, upon which the fact-finder can reach a verdict.

Second is the contention, logically speaking, that expert testimony is required on the "whether the materials in question go substantially beyond the limits of candor in describing sex or nudity according to the national contemporary community standards" element of *Roth*.

It is unrealistic to assume that twelve people on a jury will know what is the "national contemporary community standard" reference point concerning different types of materials, alleged to be obscene. Also, how can individual jurors or judges properly apply a charge on "national contemporary community standards" without expert testimony as to those facts that would comprise a violation of the appropriate community standard?

Thus, expert testimony is required, in all cases, to establish how the materials in question violate the "national contemporary community standards." Absent such testimony the jurors will be allowed to ascertain that the materials in question are obscene on a subjective reflection of the taste or moral outlook of the individual jurors. This is error, because such a decision should be based on an objective reflection, supported by competent evidence offered by the state censor in the form of "expert testimony", and not assume that jurors necessarily express or reflect national community

standards. See, *United States v. Klaw, supra*; *In re Giannini, supra*; and *Luros v. United States, supra*.

Expert testimony is further required, once there has been an alleged "violation of national contemporary community standards", to establish the other part of this particular element, i.e., "do the materials in question go substantially beyond the limits of candor in describing sex or nudity?", because the individual juror governs his conduct and morals by his own standards, not those of the community as a whole, and a juror should not have the discretion to make a personal judgment, based on his own standards, as to whether the material is or is not to be armed with First Amendment protection. The problem, requiring expert testimony as a solution, is apparent when a local jury is applying a "national contemporary community standard" to the question of whether the materials go beyond the customary limits of candor in the Nation.

Third is the logical contention that expert testimony is required to prove "the materials are utterly without redeeming social value" element of *Roth*. This very language illustrates the obviousness of the necessity for experts. There are numerous "social values" within our Nation, and only expert testimony can lend any credence to the proposition that any particular material is "utterly without" the "redeeming social value" that would cloak the material with First Amendment protection. Lawyers, judges and jurors are just not qualified to make the decision that any materials do not have some artistic, literary, historical, entertaining, informative, educational, etc., *ad infinitum*, value, so as to amount to that material which does not have First Amendment protection and is thus proscribable.

This is particularly true when it is realized that there are numerous changes in "social value", and their order of interest and importance within the Nation as a whole, taking place every day. It is respectfully submitted that, as an example, this Court can consider the increasing interest in matters relating to human sexual activities such as (a) the Kinsey Report, (b) the present-day "sexual revolution", (c) the increasing interest in obtaining materials that portrays the different techniques and methods by which one can give to or obtain from another sexual gratification, (d) the relaxation of archaic laws pertaining to sexual acts performed in a private environment between consenting adults, and (e) the reaffirmation of the personal right to read and view any material an adult person may wish when it is within the privacy of one's home. Thus, a change in "social value" relating to sexual matters has definitely taken place within the Nation.

It is respectfully submitted that in prosecutions to any sex-oriented materials, expert testimony on the fact that the materials in question are utterly without redeeming social value under present day societal-sex oriented standards, without consideration of the numerous other "social value" aspects that any particular material may have, is needed for the trier of fact to reach a well-founded and logical decision. Evidence of this contention is ample in light of the numerous *per curiam* reversals (see, *Roth*, or *Redrup* and its progeny) rendered by the Supreme Court since 1957.

The above clearly points to the fact that expert testimony is required in the area of obscenity prosecutions. Cf., *Smith v. California*, 361 U.S. 147, 180 (J. Frankfurter, concurring, and

requiring experts on contemporary community standards); *United States v. Alexander*, 428 F.2d 1169, 1174, n. 7 (8 Cir. 1970) (where the reference is to the divergent opinions as to what is or is not "hard-core-pornography"), which exemplifies the fact that in all cases expert testimony on the elements of the obscenity of the questioned materials is required, because the courts, lawyers, jurors, magistrates, and police officers just do not know what materials are outside the protection of the First Amendment guarantees.

There is yet another reason why expert testimony is required in obscenity prosecutions: failure to require the governmental censor to prove every element of the offense with which a defendant has been charged is a violation of the defendant's rights to due process of law and, in cases involving First Amendment implications, this requirement should be even more strictly applied.

Where the "transcendent value of speech" is involved, due process requires "that the State bear the burden of persuasion to show that the [accused] engaged in criminal speech." *Speiser v. Randall*, 357 U.S. 513, 526; *Freedman v. Maryland*, 380 U.S. 51; *New York Times Co. v. Sullivan*, 376 U.S. 254, 271, 277-280, 283-288; *Thompson v. City of Louisville*, 362 U.S. 199, 206; *Smith v. California*, 361 U.S. 147.

Permitting suppression and punishment without proof of the essential ingredients of an offense, ingredients which are made necessary by the requirements of the Constitution, undermines a broad category of rights guaranteed by the free speech, press, and due process provisions of the Constitution. The right to fair notice and hearing, the right of

confrontation of witnesses, and the assistance of counsel are meaningless and constitute a mere gloss when the prosecution is not required to prove the elements of an offense. *Pointer v. Texas*, 380 U.S. 400; *Douglas v. Alabama*, 380 U.S. 415; *Brookhart v. Janis*, 384 U.S. 1; *Turner v. Louisiana*, 379 U.S. 466. Without proof of the elements of the offense of obscenity, "it would be altogether too easy for any prosecutor to stand before a jury, display the exhibits involved, and merely ask in summation: 'Would you want your son or daughter to see or read this stuff?' A conviction in every instance would be virtually assured." *United States v. Klaw*, 350 F.2d at 170.

Books and writings do not in themselves prove such elements as contemporary standards, prurient interest or social importance. Whether a book exceeds limits of candor, or appeals to a shameful or morbid interest in sex, or is utterly without redeeming social value, can only be established by evidence and not by conjectures, presumptions or subjective reactions. *Tot v. United States*, 319 U.S. 463; *New York Times Co. v. Sullivan*, 376 U.S. 254; *United States v. Romano*, 382 U.S. 136. As this Court has warned on different occasions, and as the Court of Appeals of the Second Circuit made clear in *Klaw*, *supra*, courts and juries in obscenity prosecutions do not sit to act as censors of material personally objectional to them.

Without proof of evidence, reviewable by an appellate court, to determine if limits of candor have actually been exceeded, or that a writing appeals to no other interest but prurient interest, or is without any social importance at all, there is little assurance, it is submitted, that nonobscene

writings can be protected. As was stated by the Court of Appeals in *Klaw*, "it is the record and not our feelings that must control Unless there be this protection, a witch hunt might well come to pass which would make the Salem tragedy fade into obscenity." 350 F.2d at 170. The volume of obscenity cases already disposed of by this Court with Reversals, and the volume of cases now before this Court, is ample evidence that the "witch hunt" has already developed into advance stages.

The State's failure to introduce expert testimony on each element of the offense shifts the burden of proof to the defendant to prove the nonobscenity of the materials in question. It is an erroneous contention and a misapplication of the law to say that if the defendant in a obscenity case puts on evidence as to the three elements of obscenity in order to get a nonobscenity holding, the State does then not have to put on any evidence. This contention is in violation of all constitutional principles of due process in that it is a complete shifting of the requirements of the burden of proof and such requirements are never supposed to shift; i.e., the censor has the burden of proof to put on evidence as to the elements of all offenses, and this burden never shifts but rather it extends throughout the whole trial. See, *Gojack v. United States*, 384 U.S. 702, 86 S.Ct. 1689, 1693. The accused is not to be convicted unless the prosecution "shoulder the entire load". See, *Tehan v. Shott*, 382 U.S. 406, 415; *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 1620; *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 1831; *United States v. Klaw*, 350 F.2d 155 (2 Cir. 1965).

The other aspect of the contention that no expert testimony need be presented, but only the materials need be

introduced into evidence, is the application of a *res ipsa loquitur* - negligence approach to an obscenity prosecution, whether criminal or civil. It is respectfully submitted that there is no conceivable way that the tort-negligence area of the law can be applied to the obscenity-criminal or civil prosecutions. This contention is based on two propositions:

1) While in every criminal case all elements of the offense must be proved and the negligence standard, as applied in a criminal case, is based on that type of conduct which people are in contact with on an every-day basis; e.g., one person, as an average man, will know the driving habits of another person in a negligent-homicide case when the defendant has been driving 75 miles per hour into a crowd of people, because it is presumed that a reasonable man would know that high rate of speed would injure or kill some person in the crowd.

The obscenity area of the law is not that area which can be based on a "reasonable man" standard, because this area is more of an idea than an every-day standard of living; and a reasonable man needs expert testimony to prove, beyond a reasonable doubt, the three-pronged test of obscenity, because he does not have contact with these three elements in every-day living as he does in a negligence case.

2) Evidence of this proposition is shown by a review of the cases where the materials were merely presented to the jury without expert testimony on the necessary elements of obscenity, and were reversed by the Supreme Court.

2) The standard of that burden of proof which is required in any prosecution is completely different from the burden of proof required in civil litigation, such as the negligence area. The prosecution of a criminal case must prove its position, beyond a reasonable doubt, before the jury can render a guilty verdict, but the plaintiff in a civil case need only prove its position "by a preponderance of the evidence" before the jury can hold the defendant liable due to his alleged negligence. It is respectfully submitted that this operates as a denial of a due process of law.

The inherent guarantees of the United States Constitution mandates even further reason why expert testimony is required in an obscenity prosecution. First are those rights and guarantees as provided by the First Amendment freedoms, which have previously been discussed herein. Second is the defendant's right to confront witnesses and assistance of counsel guaranteed under the Sixth Amendment to the United States Constitution. Thus, the mere introduction of allegedly obscene materials does not provide the defendant with his constitutional right to confront witnesses, and further nullifies any possibility of cross-examination, since materials cannot be cross-examined. There is no effective assistance of counsel in this type of

obscenity prosecution, because counsel has had no opportunity to be effective. The *scienter* requirement in an obscenity prosecution is mandatory and the mere introduction of the allegedly obscene materials does not satisfy this mandate and violates the First, Fourth, Fifth, Sixth and Fourteenth Amendments.

The entire proceeding in this manner deletes any proper judicial hearing upon which the defendant's rights to due process of law, could be said to have been predicated.

It is recognized that each court is obligated to make an evaluation on the issue of whether the materials are obscene. See, *Jacobellis v. Ohio*, 378 U.S. 184; *Napue v. Illinois*, 360 U.S. 264; *Haldeman v. United States*, 340 F.2d 59 (10 Cir. 1965); *Kahm v. United States*, 300 F.2d 78 (5 Cir. 1962); *In re Giannini*, 446 P.2d 535 (Calif. 1968); *Hudson v. United States*, 234 A.2d 903 (D.C. Ct. App. 1967); *U.S.A. v. Groner*, *supra*

This independent evaluation must be made at some stage of the proceedings prior to the actual trial on the merits or, if such evaluation is made at the appellate level, prior to the actual review of the trial court's record of the proceedings. Each court, in making this independent determination, must compare the allegedly obscene materials involved in the instant prosecution with those materials that have received a prior judicial determination of nonobscenity. After making this comparison, the court must decide whether to proceed or dismiss. Should the court decide to proceed in the normal course of the proceedings expert testimony must be required by the court to explain the differences between the comparable materials and those involved in the censorship attempt. It is respectfully submitted that no court can apply

the three-pronged test of *Roth* to any given material and, more particularly, apply said test in good conscience after making the required comparison. Thus, expert testimony is necessary for a trier of fact or appellate court review, in order that the absence or presence of the elements of obscenity can be applied to the materials in question when compared with the materials that have received prior judicial determinations of nonobscenity by this Court and other federal and state courts.

Thus, it is respectfully submitted that this Court should require expert testimony in all obscenity cases, whether civil or criminal, because without expert testimony there is no foundation upon which to reach any reasonable and just verdict. This proposition, it is submitted, is elementary in light of the basic principle that in other types of criminal prosecutions all elements of the offense must be proved, and in an obscenity prosecution the First Amendment implications put an even more stringent burden on the censor to prove the elements of the offense. As an example, in the case of a criminal prosecution for the illegal importation of heroin, the prosecution must prove that the defendant had the heroin in his possession, that he knew it was heroin, that he intended to import it illegally, and that the contraband was in fact heroin, which can only be proved by "expert testimony", e.g., a chemist-toxicologist that administered the chemical test evidencing a "positive" result that the contraband was heroin. Why reduce this type of requirement in a "contraband" criminal prosecution to that of "no evidence is necessary on the elements of obscenity" in an obscenity prosecution? "Heroin" has no presumption of constitutional protection, but conduct and materials relating to speech and press is

presumed protected by the First Amendment. Therefore, the censor must introduce expert testimony to rebut this presumption of First Amendment protection. Public policy dictates even greater court-procedural safeguards in the obscenity area than those of the other classifications of criminal prosecution, because a mistake by the fact-finder in an obscenity prosecution harms not only the defendant but also the national population as a whole, by suppressing thoughts and ideas to which the public would ordinarily be entitled. See, *Speiser, supra*.

3. THE STATE OF GEORGIA MAY NOT, CONSISTENT WITH THE FIRST, FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, UTILIZE *AD HOC* PROCEDURES TO ENJOIN DISSEMINATION OF PRESUMPTIVELY PROTECTED FIRST AMENDMENT MATERIALS WHERE THERE IS NO STATUTORY PROCEDURE OR AUTHORITATIVE JUDICIAL DECISION AUTHORIZING THE SAME WITH APPROPRIATE PROVISIONAL SAFEGUARDS.

This Court did not consider constitutional aspects of alleged obscenity and the application of the *First Amendment* thereto until 1957, when it decided at the same time two (2) cases.

The first case related to the procedure, lawfully to be employed by States in restraining the dissemination of alleged obscenity. This case was styled, *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), wherein this Court sustained the

facial constitutionality of a state statute as construed which permitted the institution by the State of New York of proceedings seeking injunctive relief after "adversary judicial hearings" designed to "focus searchingly" on the issue of obscenity. The statutory procedure in New York postponed *any restraint* until a judicial determination of obscenity following notice and an adversary hearing. The statute by its terms provides for a hearing one day after joinder of issue and the judge must hand down his decision within two days after termination of the hearing.

The Court in its concluding comments in *Kingsley Books, Inc. v. Brown, supra*, stated:

"... Section 22-a is concerned solely with obscenity and, as authoritatively construed, it studiously withholds restraint upon matters not already published and not yet found to be offensive."

The Court on the same day decided the question in the abstract as whether, in essence, obscenity is under all circumstances within the ambit of the *First Amendment*, and the Court in *Roth v. United States of America*, 354 U.S. 476 (1957) held that under all circumstances, obscenity cannot be said to be absolutely protected by the mantle of the *First Amendment*. The Court went on to warn that the permissible limits of state and/or Federal power to deal with obscenity are severely restricted and stated at page 488,

"Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent

encroachment upon more important interests. *It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.*" (Emphasis supplied.)

The next case of import wherein the Court dealt with procedural requirements in obscenity litigation, involved the case of *Smith v. People of the State of California*, 361 U.S. 147 (1959) wherein the Court held that the City Ordinance was unconstitutional for failure to require by its terms as construed for scienter, and did so by virtue of the due process clause of the Fourteenth Amendment to the Constitution.

The Court's rationale for striking down the unconstitutional ordinance was stated in part as follows:

"It has been stated here that the usual doctrines as to the separability of constitutional and unconstitutional applications of statutes may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution. . . . And this Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."

In 1961, the Court again considered the issues of procedural due process in the area of the exercise of First

Amendment freedoms when it ruled in *Marcus v. Search Warrant*, 367 U.S. 717 as follows:

"...It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech.

"We believe that Missouri's procedures as applied in this case lacked the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled. (Emphasis Supplied.)

"...Procedures which sweep so broadly and with so little discrimination are obviously deficient in techniques required by the Due Process Clause of the Fourteenth Amendment to prevent erosion of the constitutional guarantees. (Emphasis Supplied.)

"...Finally, a subdivision of the New York statute in *Kingsley Books* required that a judicial decision on the merits of obscenity be made within two days of trial, which in turn was required to be within one day of the joinder of issue on the request for an injunction. In contrast, the Missouri statutory scheme drawn in question here has no limitation on the time within which decision must be made, only a provision for rapid trial of the issue of obscenity." (Emphasis Supplied.)

The Court thus in effect severely criticized the Missouri statutory procedure, which it held in essence was unconstitutional as construed in the context of the case at bar.

The Court in arriving at its decision in *Marcus* cited in support its language in *Speiser v. Randall*, 357 U.S. 513 (1958) where it said:

"As cases decided in this Court have abundantly demonstrated, the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn... The separation of legitimate from illegitimate speech calls for more sensitive tools that California has supplied."

The next case considering the issue of rigid procedural safeguards as being required in the area of *First Amendment* freedoms was *Bantam Books, Inc. v. Sullivan, et al.*, 372 U.S. 58 (1963), where the Court in discussing the issue stated:

"It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity... without regard to the possible consequences for constitutionally protected speech. *Marcus v. Search Warrant of Property*, 367 U.S. 717, 730, 731, 6 L ed 2d 1127, 1135, 1136, 81 S. Ct. 1708.

Thus, the Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. It is characteristic of the freedoms of

expression in general that they are vulnerable to gravely damaging yet barely visible encroachments. Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards, *Smith v. California*, 361 U.S. 147, 4 L ed 2d 205, 80 S. Ct. 215; *Marcus v. Search Warrant of Property*, (U.S.) *supra*, is therefore but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks.¹⁰ Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. See *Near v. Minnesota*, 283 U.S. 697.

(Footnote 10) "Nothing in the Court's opinion in *Times Film Corp. v. Chicago*, 365 U.S. 43, 5 L ed 2d 403, 81 S. Ct. 391, is inconsistent with the Court's traditional attitude of disfavor toward prior restraints of expression. The only question tendered to the Court in that case was whether a prior restraint was necessarily unconstitutional under all circumstances. In declining to hold prior restraints unconstitutional per se, the Court did not uphold the constitutionality of any specific such restraint. Furthermore, the holding was expressly confined to motion pictures."

The next case of import to be decided by this Court relating to the requirements of procedural due process in the context of First Amendment Freedoms was *A Quantity of Copies of Books, et al. v. Kansas*, 378 U.S. 205 (1964), wherein the Court struck down the statutory procedure followed by the State of Kansas, and held in part as follows:

"...We conclude that the procedures followed in issuing the warrant for the seizure of the books, and

authorizing their impounding pending hearing, were constitutionally insufficient because they did not adequately safeguard against the suppression of non-obscene books. For this reason we think the judgment must be reversed. . .

"...It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech. See also *Smith v. California*, 361 U.S. 147, 152-153, 4 L ed 2d 205, 210, 211, 80 S. Ct. 215.

"Nor is the order under review saved because, after all 1,715 copies were seized and removed from circulation, P-K News Service was afforded a full hearing on the question of the obscenity of the novels. For if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgment of the right of the public in a free society to unobstructed circulation of nonobscene books. *Bantam Books v. Sullivan*, *supra*; *Roth v. United States*, 354 U.S. 476, 1 L ed 2d 1498, 77 S. Ct. 1304; *Marcus v. Search Warrant*, *supra*; *Smith v. California*, *supra*. Here, as in *Marcus*, 'since a violation of the Fourteenth Amendment infected the proceedings, in order to vindicate appellants' constitutional rights' 367 U.S. at 738, 6 L ed 2d at 1140, the judgment resting on a finding of obscenity must be reversed."

As indicated in a footnote quoted from the case of *Bantam Books, Inc. v. Sullivan*, *supra*, the Supreme Court had earlier considered the issue of whether under all circumstances, "prior restraint" was necessarily

unconstitutional with reference to motion pictures. In declining to hold prior restraints unconstitutional per se, the Court did not uphold the constitutionality of any specific such restraint. In a case decided in 1965, the Court held unconstitutional a specific statutory procedure for restraint in a case entitled *Freedman v. State of Maryland*, 380 U.S. 51. Addressing itself to the Maryland statutory scheme the Court stated:

Although we have no occasion to decide whether the vice of overbreadth infects the Maryland statute, we think that appellant's assertion of a similar danger in the Maryland apparatus of censorship—one always fraught with danger and viewed with suspicion — gives him standing to make that challenge. In substance his argument is that, because the apparatus operates in a statutory context in which judicial review may be too little and too late, the Maryland statute lacks sufficient safeguards for confining the censor's action to judicially determined constitutional limits, and therefore contains the same vice as a statute delegating excessive administrative discretion.

"It is readily apparent that the Maryland procedural scheme does not satisfy these criteria. First, once the censor disapproves the film, the exhibitor must assume the burden of instituting judicial proceedings and of persuading the courts that the film is protected expression. Second, once the Board has acted against a film, exhibition is prohibited pending judicial review, however protracted. Under the statute, appellant could have been convicted if he had shown the film after unsuccessfully seeking a license, even though no court had ever ruled on the obscenity of the film. Third, it is abundantly clear that the Maryland statute provides no assurance of prompt judicial determination. We hold, therefore, that

appellant's conviction must be reversed. The Maryland scheme fails to provide adequate safeguards against undue inhibition of protected expression, and this renders the § 2 requirement of prior submission of films to the Board an invalid previous restraint.

"How or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide. But a model is not lacking: In *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 1 L. ed. 2d 1469, 77 S. Ct. 1325, we upheld a New York injunctive procedure designed to prevent the sale of obscene books. That procedure postpones any restraint against sale until a judicial determination of obscenity following notice and an adversary hearing. The statute provides for a hearing one day after joinder of issue; the judge must hand down his decision within two days after termination of the hearing. The New York procedure operates without prior submission to a censor, but the chilling effect of a censorship order, even one which requires judicial action for its enforcement, suggests all the more reason for expeditious determination of the question whether a particular film is constitutionally protected." (Emphasis supplied.)

The City of Chicago licensing ordinance for motion picture film, not called into question in the *Times Films* case, was before the Court in *Teltel Film Corporation v. Cusack*, 390 U.S. 139 (1968) and was declared unconstitutional in part for failure to provide by its terms for procedural safeguards held constitutionally required in the area relating to the exercise of First Amendment freedoms. The Court stated:

"In *Freedman v. Maryland*, 380 U.S. 51, 58-59, 13 L ed 2d 649, 654, 655, 85 S. Ct. 734, we held '...that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.... To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a *specified brief period*, either issue a license or go to court to restrain showing the film.'... [T]he procedure must also assure a *prompt final judicial decision*, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.' (Emphasis supplied.) The Chicago censorship procedures violate these standards in two respects. (1) The 50 to 57 days provided by the ordinance to complete the administrative process before initiation of the judicial proceeding does not satisfy the standard that the procedure must assure 'that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film.' (2) *The absence of any provision for a prompt judicial decision by the trial court violates the standard that '...the procedure must also assure a prompt final judicial decision....'*

"Accordingly, we reverse the judgments of the Supreme Court of Illinois and remand the case for further proceedings not inconsistent with this opinion."

In a case entitled *Carroll v. President and Commissioners of Princess Anne County*, 393 U.S. 175 (1968) this Court again reiterated the need for procedural safeguards in the area of the exercise of *First Amendment* freedoms when it stated:

"The Court has emphasized that '(a) system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.' *Bantam Books v. Sullivan*, 372 U.S. 58, 70, 9 L Ed 2d 584, 593, 83 S. Ct. 631 (1963); *Freedman v. Maryland*, 380 U.S. 51, 57, 13 L Ed 2d 649, 654, 85 S. Ct. 734 (1965). And even where this presumption might otherwise be overcome, the Court has insisted upon careful procedural provisions, designed to assure the fullest presentation and consideration of the matter which the circumstances permit. As the Court said in *Freedman v. Maryland*, supra, at 58, 13 L Ed 2d at 654, a noncriminal process of prior restraints upon expression 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.'"

In most of the cases cited herein for support of the position of the parties that procedural due process in the area of *First Amendment* freedoms requires a constitutionally valid statutory procedure, the Court did in fact strike down statutory procedures which were as the Court stated in essence "infected with the statutory vice of vagueness or impermissible overbreadth". The language of the Court in those cases reiterates time and time again that rigid procedural safeguards must be employed and those rigid procedural safeguards must insure that there will be no curtailment "of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line."

Mr. Justice Frankfurter has once said, "The history of American Freedom, is, in no small measure, the history of procedure." *Malinski v. New York*, 324 U.S. 401, 414 (1945). Although this was said in the context of criminal procedure,

the views expressed were reaffirmed and elaborated on in *Speiser v. Randall*, *supra*, when Mr. Justice Brennan for the Court wrote as follows:

"When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441, 442, 1 L ed 2d 1469, 1473, 1474, 77 S. Ct. 1325; *Near v. Minnesota*, 283 U.S. 697, 75 L ed 1357, 51 S. Ct. 625; cf. *Cantwell v. Connecticut*, 310 U.S. 296, 305, 84 L ed 1213, 1218, 60 S. Ct. 900, 128 ALR 1352; *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 96 L ed 1098, 72 S. Ct. 777; *Winters v. New York*, 333 U.S. 507, 92 L ed 840, 68 S. Ct. 665; *Niemotko v. Maryland*, 340 U.S. 268, 95 L ed 267, 71 S. Ct. 325, 328; *Staub v. Baxley*, 355 U.S. 313, 2 L ed 2d 302, 78 S. Ct. 277.

"To experienced lawyers it is commonplace that the outcome of a lawsuit — and hence the vindication of legal rights — depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights. Cf. *Powell v. Alabama*, 287 U.S. 45, 71, 77 L ed 158, 171, 53 S. Ct. 55, 84 ALR 527. *When the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement*

of constitutionally protected rights — rights which we value most highly and which are essential to the workings of a free society. More over, since only considerations of the greatest urgency can justify restrictions on speech, and since the validity of a restraint on speech in each case depends on careful analysis of the particular circumstances, cf. *Dennis v. United States*, 341 US 494, 95 L ed 1137, 71 S. Ct. 857, and *Whitney v. California*, 274 US 357, 71 L ed 1095, 47 S. Ct. 641, both supra, the procedures by which the facts of the case are adjudicated are of special importance and the validity of the restraint may turn on the safeguards which they afford. Compare *Kunz v. New York*, 340 US 290, 95 L ed 280, 71 S Ct. 312, 328, with *Feiner v. New York*, 340 US 315, 95 L ed 295, 71 S Ct 303, 328. It becomes essential, therefore, to scrutinize the procedures by which California has sought to restrain speech.” (Emphasis supplied.)

More recent cases have adhered to the above-expressed views. In *Blount v. Rizzi*, 400 U.S. 410 (1971), this Court held that Federal postal statutes (39 U.S.C. §§ 4006, 4007) violated the *First Amendment* because of a lack of procedural safeguards, since the statutes neither required the Postmaster General to seek a prompt judicial determination of the obscenity of magazines before barring them from the mail, nor provided any assurance of prompt judicial review of the administrative proceedings.

Again, in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), this Court had before it the question of the validity of an injunction against distributing “any literature” in an Illinois town. This Court emphasized that:

"Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity. *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

Even more recently, this Court refused to sanction the prior restraint upon the publication of the "Pentagon Papers" by two newspapers. *New York Times Co. v. United States*, 403 U.S. 714 (1971). The *per curiam* opinion of the Court cited *Bantam Books, Inc. v. Sullivan*, *supra*; *Near v. Minnesota*, 283 U.S. 697 (1931), and *Organization for a Better Austin v. Keefe*, *supra*, and then held that the Government had not met its heavy burden of showing a justification for a prior restraint against publication of the classified study therein involved. *New York Times Co. v. United States*, *supra*, at 714.

It is in the context of the above history of procedural safeguards and presumptions against the validity of prior restraints that the procedures herein must be judged.

First, the procedures utilized by the Respondents herein are *ad hoc*. They are not pursuant to a statutory scheme designed to focus searchingly on the question of obscenity *vel non* of the materials, nor are they pursuant to a statutory scheme which requires a judicial decision within two days of the conclusion of the trial. Cf., *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957).

Second, the Respondents were not proceeding pursuant to a statutory scheme at all. The only statute to which the Complaints referred is the Georgia criminal statute referring

obscene material, *Georgia Code* § 26-2101 (Appendix, pp. 19-21; 38-40), and that was to utilize the statute's test for obscenity.

Moreover, the trial court held its hearing on January 13, 1971, but the decision of the trial judge was not rendered until April 12, 1971, which is eighty-nine (89) days, or nearly three months. Nothing except the judicial caseload and work habits of the trial court judge operated to produce the decision within that length of time; it might have been longer or shorter, depending upon the vagaries of the situation. Certainly, no Georgia statute or case law required a decision within a given period of time, let alone the two days contained in the New York Statute approved in *Kingsley Books, Inc. v. Brown*, *supra*.

In *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971), this Court was called upon to determine the constitutionality of 19 U.S.C. § 1305 (a). In an opinion by Mr. Justice White, announcing the judgment of the Court which expressed the views of six members of the Court, it was held, *inter alia*, that § 1305 (a) was to be construed as requiring that judicial forfeiture proceedings be instituted no more than fourteen days after the seizure of allegedly obscene materials and that a final decision in the District Court be reached no more than sixty days after the filing of the action. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 374, 375.

The above case is not instructive in considering the validity of the approach used by Respondents in this case. First, no statute is available to be construed; second, the time

period involved herein is greater by nearly one-third than that approved in *Thirty-Seven Photographs, supra*.

In summary, the *ad hoc* procedure utilized by Respondents did not conform to the requirements of *Freedman v. Maryland, supra*; *Tittel Film Corporation v. Cusack, supra*; *Blount v. Rizzi, supra*; or even *United States v. Thirty-Seven Photographs, supra*, and therefore, the rights of Petitioners guaranteed by the Constitution have been violated by the decision of the Supreme Court of Georgia and the same should be reversed.

4. WHETHER THE DISPLAY OF ANY SEXUALLY ORIENTED FILMS IN A COMMERCIAL THEATRE, WHEN SURROUNDED BY NOTICE TO THE PUBLIC OF THEIR NATURE AND BY REASONABLE PROTECTION AGAINST EXPOSURE OF THE FILMS TO JUVENILES, IS CONSTITUTIONALLY PROTECTED?

The Report of Commissioners Hill and Link, concurred in by Commissioner Keating, popularly known as the *Minority Report to the Commission on Obscenity and Pornography* (September 30, 1970, United States Government Printing Office) at page 422 and 423, describes twenty-two (22) categories of sexually oriented publications which the Minority contends equates with and are synonymous to obscenity in the legal sense:

1. The Stag Film
2. The Sexploitation Film
3. The Commercial X-rated Film

4. The Commercial Unrated Film
5. Advertisements for X and Unrated Films
6. Underground Sex Publications
7. Underground Newspapers
8. Mimeographed Underground Newspapers
9. Sensational Tabloids
10. Homosexual Magazines
11. Sex-violence Magazines
12. "Spreader" or "Tunnel" Magazines
13. Tenny Sex Magazines
14. Pseudo-scientific Sex Publications
15. So-called Nudist Magazines
16. Lyrics on Commercially Distributed Rock Records
17. Sex-action Photographs
18. Sex-action Records
19. Sex-action Slides and Tapes
20. Mail Order Advertisements for the Above
21. Paperbacks with themes of Homosexuality, Sado-masochism, Incest, Bestiality
22. Hardcover Books devoted to Homosexuality, Sado-masochism, Incest

The Minority thus issues a clarion call to prosecutorial officials throughout the country, State and Federal, to review all such materials within their geographical jurisdiction falling into any of the enumerated categories, to consider suppression of the protected dissemination by court action, civil or criminal.

In this day when we read about heavy court caseloads, judicial dockets being overcrowded, the potential of our appellate courts breaking down, the proposal of the Minority

is an invitation to open anarchy and is ludicrous, and invites unconstitutional censorship and prohibited prior restraint under the color of judicial sanction, at least at the *nisi prius* level of courts, State and Federal.

In March 1954, Professors Lockhart and McClure, Volume 38, No. 4 of the Minnesota Law Review, in their article entitled "Literature, The Law of Obscenity, and The Constitution", discussed the obscenity problem presented in the Doubleday & Co. book by Edmund Wilson entitled *Memoirs of Hecate County*.

Edmund Wilson, who recently passed away, was the Nation's foremost literary critic, but yet, serious reviewers took entirely different viewpoints of the book with some contending it was pathological and filled with offensive vulgarity that defied description and yet others called it a literary masterpiece.

Within a few months, *Memoirs of Hecate County* was under attack for obscenity in New York, San Francisco and Los Angeles. The major battle was fought in New York where Doubleday itself was charged with publishing and selling an obscene book. This was the first case to reach the Supreme Court squarely raising the question of obscenity and the First Amendment. This Court divided equally with no opinion *Doubleday and Company v. New York*, 335 U.S. 848 (1948), Mr. Justice Frankfurter did not participate. The Lower Court estimation that the book was obscene was left standing and no guidance for future cases or conduct from any appellate court or this Court was rendered.

The Yale Law Journal in 1969 published an article by Al Katz in Volume 79, at page 209, entitled "Free Discussion v.

Final Decision: Moral and Artistic Controversy and the *Tropic of Cancer* Trials."

Mr. Katz indicated that shortly after publication, Federal authorities announced that there would be no prosecutions for the passage of *Tropic of Cancer* by Henry Miller through the mails. He went on to state:

"[W]ithin a year, over sixty local communities - from the stereotypically provincial to the mythically sophisticated - had commenced legal proceedings against the book."

The article undertakes to discuss the eight trials which were held throughout the country to suppress the *Tropic of Cancer* and this article clearly shows again the difficulty experienced by well-intended, well-meaning individuals who attempt to make a value judgment of the merit, worth, value, appeal and tolerance of a publication, guided by their own subjective feelings.

It becomes clearly apparent that much confusion exists and that the emphasis in so-called obscenity litigation should change from that of expression to that of action.

Thomas I. Emerson in his recently published book, *The System of Freedom of Expression* (Random House, 1970) sets out at page 495 - 503 what he entitled and what he considers to be "Proposed Theory of Obscenity Controls".

"If an obscene communication is forced upon another person against his will it can have a 'shock effect' and such a communication can properly be described as 'action.' An obscene telephone call is an

obvious example. But the problem is not confined to that form of communication. Generally speaking, as already noted, the effects of erotic material upon the recipient are presently unknown. But the available evidence does seem to establish that exposure to such material is for some persons an intense emotional experience. A communication of this nature, imposed upon a person contrary to his wishes, has all the characteristics of a physical assault. The harm is direct, immediate, and not controllable by regulating subsequent action. Such communications can therefore realistically be classified as action. Moreover, from a slightly different point of view, forcing obscenity upon another person constitutes an invasion of his privacy, and for that reason also falls outside the system of freedom of expression." The distinction between this area of conduct and the expression protected by the First Amendment touches a limited but central feature of the obscenity problem.⁴⁶

"In addition to drawing the line between expression and action, it is necessary to deal with one other major issue posed by the obscenity laws. This is the place of children in a system of freedom of expression. As previously indicated, that system cannot and does not treat children on the same basis as adults. The world of children is not the same as the world of adults, so far as a guarantee of untrammelled freedom of the mind is concerned. The reason for this is, as Justice Stewart said in *Ginsberg*, that a child "is not possesses of that full capacity for individual choice which is the presupposition of the First Amendment guarantees." He is not permitted that measure of independence or able to exercise that maturity of judgment, which a system of free expression rests upon. This does not mean that the First Amendment extends no protection to children;

it does mean that children are governed by different rules. This differentiation concerns one of the most delicate aspects of the obscenity problem and embodies as key concept for dealing with that problem.

"Upon the basis of these considerations the guiding principles emerge. Any communication that can be classified as "expression," whether or not containing erotic material, is protected against any kind of abridgement by the government. In terms of the obscenity laws this means primarily that restrictions upon alleged obscenity are permissible only if a communication having a shock effect is forced upon a person against his will, or if the restriction operates only to limit dissemination of erotic materials to children." These general principles require some further elaboration and a testing against the realities of the current obscenity problem.

"Appraisal of the full protection approach is best made through an examination of its impact upon the various social interests that obscenity laws are thought to foster. Proponents of such laws have never been very precise in defining these interests. Nor has the Supreme Court thanks to the two-level theory, done much to clarify the situation. Commentators have been more fruitful, but not always agreed. If an attempt is made, however, to classify the possible social interests in terms most relevant to the problem of adjusting obscenity controls to the system of freedom of expression, the issues resolve into the protection of society against (1) immediate harmful actions resulting from exposure to erotic materials; (2) longer-range, more remote, harmful actions; and (3) internal reactions of the individual, not necessarily reflected in overt action. The third category in turn breaks down into (a) the fantasy effect and (b) the

shock effect. At another level are (4) the possible harmful results, of any of the types mentioned, from the exposure of children to erotic materials.⁴⁷

(1) The possibility of immediate harmful action following from exposure to erotic material would seem to supply the strongest reason for prohibiting access to such materials. Nevertheless this likelihood, or even certainty, would not justify restriction of expression under the theory of the First Amendment here advocated. The government is expected to direct its restrictions to action and the possible advantage of preventing the action from occurring in some cases by a prior suppression of expression in all cases would not warrant the damage done to expression. Only if the communication is so closely linked to action as to be considered a part of it could the government punish or restrict the earlier stage. If this position is sound when expression consists of direct advocacy of violence or other violation of law it would appear equally sound in the case of obscenity.

Indeed, the argument for suppression of erotic materials, on the ground they may induce illegal action, would seem substantially weaker than the argument for suppressing direct advocacy of illegal action. In the latter case the connection between the expression and the action, while often uncertain and remote, is generally thought to exist. In the former case there is no conclusive proof that any connection exists. Moreover, while the scientific case has not been demonstrated either way, there is substantial evidence that the relationship between erotic material and illegal action is at most tenuous and sporadic. Thus the leading study of sex crimes, by members of the Institute for Sex Research, reports: "It would appear that the possession of pornography does not differentiate sex offenders from nonsex offenders.

Even the combination of ownership plus strong sexual arousal from the material does not segregate the sex offender from other men of comparable social level." There is also evidence that the reading of erotic material may, by acting as a catharsis, in some cases diminish illegal acts. In addition, there is no reason to suppose that only the "objectionable" erotic materials would have the feared effect, and hence there is no ground for singling out the particular kind of eroticism the obscenity laws seek to reach. Under such circumstances the presumptions in favor of First Amendment rights would plainly call for no departure from the principles applied to other forms of expression.⁴⁸

(2) The social interest in the longer-range, more remote, effects of exposure to obscenity affords even less support for obscenity laws. Again there is no conclusive scientific basis for asserting that erotic materials shape attitudes or character in a manner that is harmful to society in the long run. It is most likely, of course, that reading does change attitudes and character; at least most people, especially writers, certainly assume so. Erotic reading may be injurious in its long-term effects. But no one contends that expression in any other area can be suppressed on such grounds. To do so would destroy the system of freedom of expression. Censorship of expression relating to sexual matters on any such basis is equally contrary to the fundamental premises of a system of freedom of expression and equally destructive.

(3) (a) The original purpose of the obscenity laws was undoubtedly far less concerned with the impact of erotic materials on overt behavior than with their impact on internal moral standards. The arousing of lustful thoughts was held to be morally corrupting and it was felt necessary that society protect its

members from such dangers. These moral considerations undoubtedly remain the chief driving force behind obscenity laws in the present day; otherwise it is hard to account for the emotional fervor that still surrounds the enforcement of such laws. There can be little doubt that erotic materials are designed to, and do, result in "heightened sexual arousal" in many persons under proper circumstances, ranging from mild sexual excitement to orgasm. The question is whether the government may constitutionally attempt to prevent its citizens from voluntarily seeking such sexual fantasies by a system of censorship. The state may, of course, enact legislation to promote and protect the morals of its citizens. But under the First Amendment it may not pursue that goal by means of restricting expression. No one disputes that the government cannot suppress speech or writing for the purpose of shielding its citizens from nonsexual thoughts or fantasies, regardless of their effect upon moral character. There is no basis in the First Amendment, or in the concepts underlying our system of freedom of expression, for applying a different rule in the case of sexual thoughts.⁴⁹

It should be added that not only is the prohibition of erotic materials, voluntarily sought by adults, incompatible with a system of freedom of expression, but such censorship is futile and discriminatory as well. Our society is crammed full of sexually stimulating reading matter, sights and events. It is literally impossible for the government to suppress all stimuli that may arouse sexual excitement, any more than it can eliminate sex. Nor can it suppress even the most erotic without eliminating much of the world's literature and art. The consequence is, already noted, that the impact of obscenity laws falls primarily, or would if the laws

could be enforced, upon particular groups in our society who happen not to prefer or be able to afford elite pornography.

(b) When erotic materials are not voluntarily acquired or perused, but are thrust upon an individual or the general public, a different question is presented. If such a communication entails a shock effect it may be classified as "action" and subjected to appropriate regulation. The treatment of erotic communications in this manner raises some troublesome questions. Ordinarily an individual seeking to exercise the right of expression is allowed considerable leeway in obtaining access to other persons, whether or not such persons have indicated a desire to receive the communication. The emotional response to a communication, even if agonizing, is normally not ground for curtailing expression. A system of freedom of expression is supposed to "invite dispute" and encourage "robust and wide-open" controversy. Under such a system even the law of libel should not authorize restriction upon communication short of an invasion of privacy. Why, then, should erotic communication be considered to pose any different problem? The answer lies in the intensity of the psychological forces that pervade our society in the area of sex. This is what creates the engulfing popular demand for obscenity laws. In our concept of privacy the sexual realm occupies an important, not to say the central, part. The notion of a "captive audience," compelled to see or hear erotic communications, is intolerable to us. It seems reasonable, therefore, to give the ordinary person and the public at large greater protection against unwanted intrusion from the presentation of erotic material than is afforded in other areas of expression.

If one accepts this approach many further issues remain. The first question is how to define the erotic

material that would be subject to restriction under this "shock effect" concept. Most likely the phrase "patently offensive because it affronts contemporary community standards" provides the best answer. Such a formula, while vague as all formulae in this area are vague, embodies the elements that must be taken into account. Other questions concern the kinds of regulation that would be permissible. These would seem to fall into two categories. The first would relate to public displays of erotic material. Thus an advertisement on a billboard or on a theater marquee might be prohibited whereas the same advertisement in a book could not. Public nudity is subject to regulation but pictures of nudes in a magazine are not. The other category involves erotic material forced into the home. It is important not to proscribe a legitimate right of access. But if a householder affirmatively makes his views known, with sufficient specificity, the government would be entitled to enforce his wishes. The difficult question here concerns radio and television. In view of the fact that radio and television signals are broadcast publicly, and enter the household without much opportunity for selection in advance, the shock effect concept would probably apply in this area also.⁵⁰

The Supreme Court, it should be noted, has given some indication that it is prepared to accept the "shock effect" doctrine. Thus in the course of its per curiam opinion in *Redrup* the Court observed that in none of the three cases before it "was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." The following term, in *Fort v. City of Miami*, the Court let stand a conviction for public display of allegedly obscene sculptures in the defendant's backyard. The Court has not, of course,

followed the proposal made here that the shock effect principle constitute the only ground for restriction of erotic communication to adults.⁵¹

(4) Acceptance of the principle that children are not part of the adult system of freedom of expression still leaves some unresolved problems. First of all it is necessary to define what materials are to be judged "obscene" for children, or otherwise proscribed for them. Such a task takes us beyond the limits of this book, and no real answers to the question will be attempted. By hypothesis the full protection theory of the First Amendment cannot be applied. Nor, in view of the present lack of knowledge about the subject, can the clear and present danger test be employed, or any test based on the effect of obscenity on children. Even a balancing test would not be feasible. We are left then, at least for the time being, with little more than a due process test—that the restriction be a reasonable one. Such a test can be supplemented by the principle that a presumption exists in favor of First Amendment rights, and can be narrowed by use of the void for vagueness rule and similar procedural devices. Over the course of time sufficient knowledge may be gained to refine and elaborate the test. But presently the courts can probably do little more than accept the legislative standard if it comes within the broad contours of reasonableness.

While the legislature may have considerable leeway in the choice of standards, it is severely circumscribed by the need to fit the restrictions pertaining to children into the system of freedom for adults. Under the *Butler* doctrine the rights of adults cannot be curtailed by regulations designed to protect children. In the case of motion pictures or

the theater, this problem is easily solved. A classification system can be established and children refused admission to those performances designated obscene under it. Otherwise, the problem of drafting regulations that will be effective for children and not interfere with adults is almost unsuperable. A classification scheme in a bookstore, by which certain shelves are marked "For Adults Only," presents obvious difficulties. Any exceptionally tight system for preventing sales to minors that resulted in retailers not stocking books banned for children would run afoul of the *Butler* rule. In any event, as long as material is available to adults it is hopeless to try to keep it out of the hands of adolescents.

In short, while *Butler* stands, laws attempting to restrict the availability of erotic materials for minors are likely to be ineffective. Controls over such matters will have to remain, as they undoubtedly should, with parents, schools, churches and similar institutions. Legislation can partially reinforce those controls and it can give the public a feeling that "something is being done." Beyond this it is likely to have little practical significance.

"To conclude, it is possible to bring obscenity laws into line with the basic principles of a system of freedom of expression. Dissemination of erotic materials to those who voluntarily choose to read or see them would be protected under the First Amendment. Forcing such material upon individuals who did not want them, or did not want their children to have them, or upon the public at large, would be prohibitable. Special rules could be made for children so long as they did not infringe upon adult rights.

A system of this sort appears entirely feasible. Denmark and Sweden seem to have found it

workable. Furthermore, the public demands for obscenity laws, which have led the courts to abandon all ordinary First Amendment doctrine in dealing with obscenity, might well be satisfied with such a system. Public morality would be upheld; those who did not voluntarily choose to read or see erotic materials would be protected; and parental control over material available to children would be supported. To go beyond this and try to keep erotic materials away from adults who want to see them is rather hard to justify in this day and age. A majority of the Supreme Court in effect conceded this in the *Stanley* case. Finally, a system of this kind would be honest. It would not ban "hard-core" pornography and allow elite pornography. Nor would it remain largely unenforced. The most likely consequence would be, as the Danish experience has shown, that pornography no longer being unlawful and therefore tempting, the volume in circulation would diminish.⁵²

(Footnotes omitted)

It is interesting to note that the total retail sales of adult-only publications has been reported in the Report of the Commission on Obscenity and Pornography, Traffic and Distribution Panel, at page 103, to be between 55 and 65 million dollars, predicated on 1969 calculations. It is estimated again by this Commission (see Table 2, at page 74) that the total volume of sexually-oriented movies at the box office would be between 450 and 460 million dollars and this includes R and X rated, sexually-oriented, unrated, and sex-exploitation films. It was further estimated that the total volume of receipts at the retail level in sexually-oriented materials totals between 537 and 574 millions of dollars. These figures do not support any suggestion that sexually-oriented materials exceed community standards if the community supports with its dollars this volume of business.

Since almost everything else in our economy has increased by approximately 7 per cent since 1969, it could be conceivably stated that the current volume would be in excess of 600 million dollars in the traffic of sexually-oriented material at the retail level.

It is further noted by the Commission on Obscenity and Pornography, Law and Law Enforcement Panel, at page 43 "a national survey of American public opinion sponsored by the Commission shows that a majority of American adults believe that adults should be allowed to read or see any sexual materials they wish." This survey was conducted in 1969, and another survey conducted by the same opinion research firm, Response Analysis, in January 1971 indicates that 74 per cent of the American people chosen on a demographic basis believe that adults should be allowed to obtain or view sexually-oriented materials under circumstances of dissemination that forewarn the public of the character thereof, where precautions are taken to exclude juveniles from exposure.

When we view the difficulty in defining what is obscene (see Bender, "Definition of 'Obscenity' Under Existing Law", Technical Report of the Commission of Obscenity and Pornography, Volume II, page 5), it is clear that the concept of focusing on expression versus conduct of the disseminator has not worked.

What we come to, in essence, is that the Georgia Obscenity Law and indeed, the obscenity law of any state or of the Federal Government, should be declared unconstitutional facially and as applied inasmuch as said

statutes are repugnant to the *First Amendment to Constitution of the United States* and the *Fourteenth Amendment* as it may apply to the States.

Thus, focusing on action versus expression, this Court should pronounce the correct doctrine, as law and indeed the true meaning of *Roth v. United States, supra*, to be the following:

The definition of what is legally obscene does not become relevant until the disseminator impermissibly encroaches upon the rights of other by the circumstances of the dissemination or proposed dissemination.

The motion picture theatres named as Petitioners herein were engaged in the dissemination of presumptively protected *First Amendment* sexually oriented films in a controlled, adults-only atmosphere. There was no evidence of *Ginzburg*-type pandering (widespread indiscriminate mailing of five million brochures which by the language of said brochures classified the material being offered for sale by mail order, as OBSCENE). There was no intrusion into the privacy of unwilling individuals who wished to avoid confrontation with this kind of material, and there was no admission of minors or offering to exhibit to minors under any state statute reflecting a specific and limited state concern for juveniles. Ideed, the decision of the trial court so holds.

It would appear that this Court, by its decisional process, has held that only when there exists an encroachment on the constitutional rights of others may the Government constitutionally punish an offender for violation of Government obscenity laws, State or Federal.

This Court in *Roth v. United States*, *supra*, at 488, stated:

"The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring Federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interest."

At this point in the opinion a footnote, No. 23, directs us back to footnote 14 of the opinion.

Footnote No. 14 follows these words by the court:

"All ideas having even the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinions — have the full protection of the guaranties, *unless excludable because they encroach upon the limited area of more important interest.*" (Emphasis supplied)

The footnote No. 14, referenced in *Roth*, cites among others, the case of *Breard v. Alexandria*, 341 U.S. 622 (1961).

The *Breard* case which involved the construction of an ordinance was held *inter alia* as applied to solicitors of magazine subscriptions, not to unconstitutionally abridge freedom of speech and press.

The opinion of this Court, addressing itself to the exercise of *First Amendment*, rights of Petitions herin stated:

"The First and Fourteenth Amendments have never been treated as absolutes. *Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses.* Rights other than those of the advocates are involved. By adjustment of rights we can have both full liberty of expression and an orderly life. (Emphasis supplied.)

This Court in a per curiam opinion in *Redrup v. State of New York*, 386 U.S. 767 (1967), appeared to delineate what may have been meant in *Roth* and *Breard* concerning "encroachment" upon rights of others, which may be significant in determining whether material alleged to be obscene is without the ambit of the *First Amendment*, when it was stated:

"In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles ... In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. *Breard v. Alexandria*, 341 U.S. 622; *Public Utilities Commission v. Pollak*, 343 U.S. 451. And in none was there evidence of the sort of 'pandering' which the Court found significant in *Ginzburg v. United States*, 383 U.S. 463."

In the *Pollak* (1951) 343 U.S. 451 case, it would appear that this Court did not find any "encroachment" on the rights of two individuals as passengers on D.C. Transit buses, in the exercise of their *First Amendment* rights to

communicate in public places, when considered in light of the finding of the Public Utilities Commission that the radio broadcasts in the buses were in the interest of the general public.

Thus in *Pollak*, the "encroachment" when adjusted to the rights of others did not "compel a finding by the Court that the radio program interfered substantially with the conversation of passengers or with rights of communication constitutionally protected in public places," of the majority.

This Court after its per curiam opinion in *Redrup v. New York, supra*, granted Certiorari and/or review in more than thirty-three (33) cases coming before the Court, and summarily reversed the findings of obscenity.

This Court in *Ginsberg v. State of New York*, 390 U.S. 629 (1968), in holding a state statute in question as reflecting "a specific and limited state concern for juveniles." *Redrup v. New York, supra*, went on to state:

"The 'girlie' picture magazines involved in the sales here are not obscene for adults."

A footnote No. 3 at this point states in part:

"Other cases which turned on findings of nonobscenity of this type of magazines include *Central Magazines Sales, Ltd. v. United States*, 389 U.S. 50; *Conner v. City of Hammond*, 389 U.S. 48; *Potomac News Co. v. United States*, 389 U.S. 47, ..."

The various inferior Federal Courts and state appellate courts, in viewing *Redrup v. New York supra*, as

The various inferior Federal Courts and state appellate courts, in viewing *Redrup v. New York supra*, as the same has been apparently historically applied by the U.S. Supreme Court, have held to the "juveniles," "encroachment" and "Ginzburg pandering" standards for determining criminal conduct and/or obscenity of the publications before the various Courts, sufficient to remove the protection afforded the interested adult public in their exercise of constitutionally protected freedom of press and speech.

In an en banc per curiam decision joined in by all five (5) members of the United States District Court for the District of Maryland, *United States v. 4,400 Copies of Magazines, Including 200 Copies each of Magazines Entitled Cover Girl Nos. 5, 6, 8, 9, 10, 11, 12, 13, 14, 15 and 16; and Exciting Nos. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16*, reported in 276 F. Supp. 902 (December 21, 1967) it was stated in pertinent part:

"It appears, therefore, that persons to whom the magazines will be offered commercially, and the methods by which they will be offered, are factors to be considered in determining whether their dissemination is protected by the First Amendment.

* * *

"... this Court is of the opinion that if the magazines involved in this case are sold to juveniles, or are offered for sale in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to them, or if they are offered for sale in a manner which amounts to pandering within the principles stated in *Ginzburg v. United States*, 383 U.S. 463, at 465-466, they would not be entitled

to the protection of the First Amendment."

Today, absent Ginzburg-type pandering foisting on an unwilling public, or distribution to minors, no publication or motion picture film should be obscene in the constitutional sense. *Redrup v. New York*, *supra*, at page 769; *Breard v. Alexandria*, *supra*; *Public Utilities Commission v. Pollak*, *supra*; *Stanley v. Georgia*, *supra*; *Poulous v. Rucker*, 388 F. 305, 307. The statute herein must be construed and interpreted to incorporate these tests. (Georgia Code Section 26-2101.)

As noted, *Redrup*, *Breard* and *Public Utilities* focused on the prohibition of foisting on a captive audience. *Stanley* dealt with so-called hard-core material. *Stanley* 394 U.S. at 567, made it plain that prohibited distribution under *Roth* now means that which intrudes upon the privacy of the general public, and the *Stanley* citation of *Redrup*, 386 U.S. at 769, should leave no doubt. Furthermore, this statement in *Stanley* must be viewed in the context of this Court's clear recognition, 394 U.S. at 564, 566 (citing *Winters v. New York*, 333 U.S. 507, 510) of the right to receive information regardless of its social worth, and that the question of whether obscene material is arguably devoid of any ideological content is not relevant because the line between the transmission of ideas and mere entertainment is too elusive "for this court to draw, if it can be drawn at all." Furthermore, *Stanley* explicitly recognized, 394 U.S. at 566, that there is little empirical evidence that exposure to obscene materials may lead to crimes of sexual violence. In short, *Stanley* recognized that prior distinctions as to whether material is classified as hard-core is not relevant. If it is not

pandered in the *Ginzburg* tradition or foisted on an unwilling public or exposed to juveniles, it is protected under the *First Amendment*.

This Court, in *United States v. Reidel*, 402 U.S. 351 (1971), seemed to say, in reliance upon *Roth v. United States*, *supra*, that a conviction for indiscriminate mailing which could potentially be sent to consenting and unconsenting adults, as well as juveniles, was not within the area of constitutionally protected speech and press. In that case, the trial court assumed for the sake of the motion which was appealed to the Supreme Court, that the materials in question were, in fact, obscene and without the protection of the *First Amendment*.

Likewise, in *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971), the plurality of this Court held that concededly obscene material seized by customs officials could be held if the same were intended for eventual commercial use, again assuming wide-spread indiscriminate dissemination.

The question thus presented here was not resolved by those opinions and it can be discerned that a constitutionally valid construction of a statute could be enacted permitting communication, the actual construction sale and distribution to consenting adults and reasonable protections against exposure to juveniles. We do not, as was done in the *Reidel* and *Thirty-Seven Photographs* cases, concede that the motion picture films before the Court are obscene in the constitutional sense, but to the contrary, that although they may be dealing with a sexual theme, this does not mean that they are presumed to be obscene. As was wisely pointed out in *Roth*, at page 47, where it was stated "sex and obscenity are not synonymous."

Professor Harry Kalven, Jr., in his article appearing in the November 1971 edition of the Harvard Law Review, Volume 85, No. 1, beginning at page 3, at pages 229-237, undertakes to critically review the opinions of this Court in *Reidel* and *Thirty-Seven Photographs*. Mr. Kalven comes to the conclusion, as a proposed solution and suggestion to the problems of obscenity litigation confronting and confounding this Court:

"This judicial task of line-drawing might be legitimately simplified through the use of presumptions, though hardly the all-embracing one involved in *Roth*. For example, it may be presumed that commercial distribution, with its generally large and nonselective class of recipients, indicates insufficient individual interests in privacy and freedom of thought to justify shielding any such activity from regulation. This would follow the result, if not the reasoning, of both *Riedel* and *Thirty-Seven Photographs*. Such a presumption could be phrased as a requirement that *Roth* control unless the defendant raised a substantial threshold claim that a protected privacy interest was being invaded."

It is interesting to note when reviewing the list of cases on the 1972-1973 Docket of this Court, 41 LW 3005, that of the first eighteen (18) listed in chronological order, at least eleven (11) relate to the subject of Obscenity and the *First Amendment*.

This suggested concept of restriction on action versus expression where there must be intrusive behavior on the part of the disseminator before sexually-oriented materials presumptively protected under the First Amendment can be criminally or civilly proscribed has apparently been accorded

recognition by the Supreme Court of the Commonwealth of Pennsylvania in two separate cases that have been heard by that court.

In connection with the pocket novel *Candy*, the subject of a civil proceeding in the Courts, the Supreme Court of Pennsylvania in *Commonwealth v. Dell Publications, Inc.*, 233 A.2d 840 (1967) stated in pertinent part:

"On May 8, 1967, without the fanfare of its trilogy, the Court handed down a cryptic per curiam opinion disposing of three consolidated cases, *Redrup v. State of New York*, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515, which may yet to be the most significant of its obscenity opinions. The impact of this opinion, along with those cases summarily decided on the last day of the term, comes as close to a holding that, in the eyes of the present Court, 'Candy' is not per se constitutionally obscene as is possible without a direct ruling on the book itself. Although the Court had originally granted review in *Redrup* to consider problems of *scienter* upon the assumption that the materials involved were obscene in the constitutional sense, it decided to dispose of the case upon the ground that they were not obscene under the first and fourteenth amendments.

"*Redrup* seems to signify the Court's final abandonment of its futile search for a determination of obscenity *vel non*. For significantly instead of attempting to determine what constituted obscenity, the Court approached the problem in terms of those circumstances under which the publication of otherwise unobjectionable material might be constitutionally restricted, 87 S.Ct. at 1415:

"In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See *Prince v. Commonwealth of Massachusetts*, 821 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645; cf. *Butler v. State of Michigan*, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. *Breard v. City of Alexandria*, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233; *Public Utilities Comm'n of District of Columbia v. Pollak*, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068. And in none was there evidence of the sort of 'pandering' which the Court found significant in *Ginzburg v. United States*, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31."

"As has already been indicated in this opinion, none of the three situations described in *Redrup* are present in the case at bar." (Emphasis supplied).

When next the substantive question of obscenity was presented to the Court, in an opinion filed November 11, 1969, in a case styled *Duggan v. Guild Theatre, Inc. et al*, 258 A.2d. 858, March Term 1969, the Opinion of the Court on this question stated as follows:

"We also noted that none of the circumstances identified in *Redrup v. New York*, 386 U.S. 767, 768, 87 S.Ct. 1414, 1415 (1967) are present in this case. The injunction does not reflect a 'specific and limited state concern for juveniles, there was no evidence of an assault upon individual privacy in a manner so obtrusive as to make it impossible to avoid exposure, and there was no evidence of 'pandering.'"

"We must therefore, hold that 'Therese and Isabelle' may not constitutionally be banned. Accordingly the decree restraining the exhibition of the movie is vacated and the case is dismissed."

And as cited previously, Mr. Justice Potter Stewart in his dissenting opinion in the case of *Ginzburg v. U.S.*, 383 U.S. 463 (1966) at page 499, stated with respect to the alleged *Roth-Alberts* test of obscenity in Footnote 2 as follows:

"It is not accurate to say that the Roth opinion 'fashioned standards' for obscenity because as the Court explicitly stated, no issue was there presented as to the obscenity of the material involved. 354 U.S. at 481. In no subsequent case has a majority of the Court been able to agree on any such 'standards'."

Mr. Justice Stewart in his dissent went on to say:

"There does exist a distinct and easily identifiable class of material in which all of these elements coalesce. It is that, and that alone, which I think government may constitutionally suppress, whether by criminal or civil sanctions. I have referred to such material before as hard-core pornography, without trying further to define it. *Jacobellis v. Ohio*, supra. In order to prevent any possible misunderstanding, I have set out in the margin a description, borrowed from the Solicitor General's brief, of the kind of thing to which I have referenced."

Thereupon, Mr. Justice Stewart used the following language to describe what he meant by "hard core pornography":

"Such materials include photographs, both still and motion picture with no pretense of artistic value

graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character."

Mr. Stewart in his opinion stated further:

"So it is that the Constitution protects coarse expression as well as refined, and vulgarity no less than elegance. A book worthless to me may convey something of value to my neighbor. In the free society to which our Constitution has committed us, it is for each to choose for himself."

At this point in his opinion he suggests rationale that was to become the ruling of the Court in *Redrup v. New York*, *supra*, when he states:

"Different constitutional questions would arise in a case involving an assault upon individual privacy by publication in a manner so blatant or obtrusive as to make it difficult or impossible for an unwilling individual to avoid exposure to it. Cf. e.g. *Breard v. City of Alexandria*, 341 U.S. 622; *Public Utilities Commission v. Pollak*, 343 U.S. 451. Still other considerations might come into play with respect to laws limited in their effect to those deemed insufficiently adult to make an informed choice. No such issues were tendered in this case."

In the opinion of the Court, authorizing Mr. Justice Marshall to speak on behalf of six members of the Court, in *Stanely v. Georgia*, 394 U.S. at 567, it was stated:

"But that case (Roth) dealt with public distribution of obscene materials and such distribution is subject to different objections. For example, there is always

the danger that obscene material may fall into the hands of children, see *Ginzberg v. New York*, supra, or that it might intrude upon the sensibilities or privacy of the general public. See *Redrup v. New York*, 386 U.S. 767. No such dangers are present in this case."

In further elaboration of this type of approach to criminal prosecution for alleged violation of obscenity statutes, the United States District Court for the District of Massachusetts, in an opinion filed on November 28, 1969, by a Three-Judge Court, in a case styled *Karalexis v. Byrnes*, 306 F. Supp. 1363, vacated on other grounds, 401 U.S. 216 (1971):

"We are asked to rule that this decision (*Stanley v. State of Georgia*) 1969, 394 U.S. 557 extends to a case where the possessors permitted a number of consenting adults or, more exactly, paying adult members of the public, to view their possibly obscene picture in a moving picture house.

"The following facts appear by stipulation of counsel or otherwise. Plaintiffs (Motion picture operator) have sufficiently indicated to the viewing public the possible offensiveness of the film, so that no patron will be taken unawares and his sensibilities offended. On the other hand, the film is not advertised in any pandering manner within the stricture of *Ginzberg v. United States*, 1966, 383 U.S. 363. Finally, it is conceded that the theatre is policed, so that non minors are permitted to enter.

"For the purposes of this case we assume that the film is obscene by standards currently applied by the Massachusetts Courts.

"The question is, how far does Stanley go? Is the decision to be limited to the precise problem of mere private possession of obscene material, (394 U.S. at 461); is it the high water mark of a past flood, or is it the procursor of a new one?

"In recognizing that public distribution differed from private consumption, the Court in Stanley gave two examples. In the case of public distribution, 'obscene material might fall into the hands of children ... or ... it might intrude upon the sensibilities or privacy of the general public.' 394 U.S. at 567. To these examples, which were the extent of the Court's discussion, it can be said, equally with Stanley, 'No such dangers are present in this case.'

"We think it probable that Roth remains fully intact only with respect to public distribution in the full sense, and that restricted distribution, adequately controlled, is no longer to be condemned."

The Court thereafter went on to say:

"If a rich Stanley can view a film, or read a book, in his home, a poorer Stanley should be free to visit a protected theatre or library. We see no reason for saying he must go alone."

Text writers have expounded upon the theory also. Professor Frank I. Michelman, Harvard Law School, wrote in *"The Supreme Court, 1968 Term," 83 Harvard Law Review 7, 147-154 (1969)* of protecting the poor through the *Fourteenth Amendment*.

"Retreating somewhat in *Stanley*, the Court held that the First Amendment does indeed forbid a state to impose a criminal penalty merely for the knowing, private possession of obscene material. Its opinion espoused a new approach to first amendment obscenity doctrine that has wide-ranging implications.

"Writing for five members of the Court, Mr. Justice Marshall stated that private possession of obscene material is protected by the First Amendment, supplemented by a right of privacy. A purpose fundamental to the protection of free speech, he said, is the guaranty of 'the right to receive information and ideas, regardless of their social worth.'

"The 'right to receive' he went on, 'takes on an added dimension' when joined as here with the 'right to be free ... from unwanted governmental intrusions into one's privacy.'

"In *Stanley*, however, the Court found 'little empirical evidence' indicative that obscenity and harmful conduct are usually connected. More importantly, it said that 'in the context of private consumption' the state may achieve its purpose through less restrictive alternatives. It may, for example, employ education or punishment of the deviant conduct itself. The same criticism applies to laws regulating public distribution. It is unlikely that the evidence is any greater than contact with obscenity through public distribution leads to harmful conduct. Indeed, one who peruses pornography alone

in his home probably had to obtain it through public distribution in the first place. The less restrictive alternative principle also would apply, though perhaps somewhat less forcefully, to a ban on public distribution.

"Interpretation of Stanley simply as a privacy decision, however, is belief by the Court's description of the privacy factor as an 'added' consideration and its formulation of the opinion in clear First Amendment terms. The principle underpinning of the opinion is really the 'right to receive' obscene material. It is that doctrinal innovation that gives the Stanley decision elasticity. The Court's concern for a 'right to receive' ideas came to light in *Martin v. City of Struthers*, relied upon by the Stanley Court. There, it served to invalidate an ordinance forbidding door-to-door distribution of handbills. Martin thus acknowledges the obvious: *that receipt is simply the last step in the process of distribution. Protection of the former requires at least some protection of the latter.* Similarly in the obscenity context, the 'right to receive information and ideas, regardless of their social worth,' should serve after Stanley to protect certain forms of public distribution as well as private possession. Surely that right may be effectively denied through a ban on all distribution of obscene material.

"So conceived, the 'right to receive' obscene material gives new meaning to the Court's distinction between private consumption and public distribution. An attribute of privacy — just as of the 'right to receive' — is the ability to control one's personal environment. *Unwanted intrusions violate one's privacy.* Yet only some forms of distribution of obscene material invade that interest. A movie theater

showing a pornographic film, for example, is public in the sense that anyone may enter if he pays the price. But the movie it shows is not 'publicly' distributed in the sense of forcing unwanted obscenity on anyone. The theater does not invade the privacy interest in freedom from unwelcome intrusion, so long as its advertising on the street is not itself obscene. In this matter, 'public distribution' may be defined narrowly to denote those forms of distribution or display which thrust obscenity on unwilling individuals. So defined, it may be banned.

"Already, one federal court has taken a step in this direction. To preserve the constitutionality of a disorderly conduct statute punishing the use of profane language in any public place, the D.C. Circuit in *Williams v. District of Columbia* read into it the qualification that the Government must allege and prove that members of the public actually heard the obscene words. The *Williams* court spoke of 'verbal assault' as the necessary ingredient after *Stanley*. This opinion suggests that *Stanley* protects a person reading an obscene publication in a public place as well as his home.

"*Stanley* may, then, signal a new doctrine that would permit obscenity to be banned only when it creates a nuisance to others, when it intrudes upon their own autonomous monitoring of their emotional and intellectual intake. The essence of an obscenity offense thus would be offense. *In solitude or in voluntary groups, in one's home or elsewhere, access to obscenity would be unimpaired so long as others are not brought into contact with obscenity against their will.* The presumed offensiveness of obscenity would allow the government to prohibit unwanted intrusions whereas the government is more constrained in its efforts to prohibit intrusions by, for

example, political propagandists. Conceived in this way, the shape of the new obscenity law would approximate the nuisance standard embodied in the Model Penal Code provisions on lewd conduct. Obscene publication that may be banned, like conduct that is lewd would be described as that 'which he (the offender) knows is likely to be observed (unwillingly) by others who would be affronted or alarmed.'

"The new doctrine suggested by the Stanley opinion is the product of more than a decade in which the Court has struggled with its own libertarian impulses as it battled head on with an instinctive notion that some obscenity regulation is both permissible and desirable. The emerging doctrine after Stanley may be uncertain in its own way. Mr. Justice Sutherland summarized well the necessarily contextual character of laws prohibiting offensive action. 'A nuisance,' he said, 'may be merely a right thing in the wrong place — like a pig in the parlor instead of the barnyard.' In the case of obscenity laws, the factor distinguishing parlors from barnyards should be the consent of all those brought into contact with the obscene material. Despite the continuing need for ad hoc resolution of conflicting forces, there is after Stanley at least hope that the lines of battle will be more aptly drawn." (Emphasis supplied).

This approach leaves to the individual citizen his basic right to choose his own way in life so long as it does not encroach upon the rights of others.

See:

- (a) "The Metaphysics of the Law of Obscenity," The Supreme Court Review, 1960, pp. 1 to 45, by Harry Kalven, Jr.

(Cited by U.S. Supreme Court in *Stanley v. State of Georgia, supra.*)

- (b) "Morals and The Constitution: The Sin of Obscenity", Vol. 63, Columbia L. R. 391, by Louis Henkin.

(Cited by U.S. Supreme Court in *Stanley v. State of Georgia, supra.*)

- (c) "First Amendment: The New Metaphysics of the Law of Obscenity", Vol. 57, Calif. L. R. 1257.

- (d) "Requiem for Roth: Obscenity Doctrine is Changing", Vol. 68, Mich. L.R., pp. 185-236, by David E. Engdahl.

Mr. Chief Justice Burger, in using the words "public displays" referred to the factual situation present in the case of *Rabe v. Washington, supra*, where the screen of the outdoor motion picture theatre was clearly visible to all motorists passing over a nearby public highway and also 12-15 nearby family residences. Additionally, young children were observed viewing the film from outside the chainlink fence surrounding the theatre grounds. Here, no such indiscriminate, uncontrolled public display is involved. In the factual situation in the case at Bar, we deal with a theatre that forewarns the potential patrons of the character of the materials be offered therein. See Appendix, pages 84-86, inclusive.

Further, all precautions are taken to exclude juveniles from the premises.

In another case, entitled *Gooding v. Wilson*, 405 U.S. 518 (1972), although relating to the constitutionality of a Georgia abusive language statute, the Court stated in its majority opinion, authored by Mr. Justice Brennan:

"[T]he statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression ..."

The Court then pointed out it could not authoritatively supply the requisite construction of a state statute. In the case at bar, an authoritative construction has been placed on the Georgia statute as issue, but said construction has refused to limit the utilization of such statutes to those instances where the action of the disseminator has the potential of intruding upon the privacy of unwilling individuals or with blatant exposure to juveniles. Therefore, this Court should declare the statute unconstitutional for its failure to do so, reverse the decision of the Supreme Court of Georgia and reinstate the decision of the trial court.

The concept being advanced by counsel here is not without some support in some recent decisions and opinions by members of this Court relating to *First Amendment* freedoms.

In *Rabe v. State of Washington*, 405 U.S. 313 (1972), Mr. Chief Justice Burger in a separate opinion joined in by Mr. Justice Rehyquist, concurring, stated:

"I, for one, would be unwilling to hold that the *First Amendment* prevents a state from prohibiting such a 'public display of scenes depicting explicit sexual activities if the state undertook to do under a statute narrowly drawn to protect the public from potential exposure to such offensive materials'. See *Redrup v. New York*, 386 U.S. 767 (1967)."

In the separate opinion by Mr. Chief Justice Burger at footnote 1 he indicated two instances as examples of recent statutes regulating general public display in Arizona and New York.

Mr. Chief Justice Burger went on to say:

"Public display of explicit materials such as are described in this record are not significantly different from any noxious public nuisance traditionally within the power of the States to regulate and prohibit, and, in my view, involve no significant countervailing First Amendment considerations."

Mr. Justice Douglas in *Griswold v. Connecticut*, 381 U.S. 510 (1965), states:

"... [T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read ... Without those peripheral rights the specific rights would be less secure."

One who has the constitutional right to possess obscene material and the right to receive it, of necessity, must have

the right to purchase or view the materials. It cannot be argued that the right to read a book or to view a movie is secure on one hand, and by statute in civil or criminal proceedings preclude the sale, exhibit, or dissemination of such materials to consenting adults under nonobtrusive circumstances. These same citizens should not be required to obtain the materials, or view the materials through an illegal source, or under surreptitious circumstances in order to exercise their fundamental constitutional rights.

The conclusion in logic then is that, absent dissemination or exhibition to juveniles and the foisting upon the sensibilities of unwilling adults in a manner that the individuals cannot avoid confrontation with it, the dissemination of any sexually-oriented motion picture films and other materials is protected under the *First* and *Fourteenth Amendment* to the *Constitution of the United States*.

See also, *U.S.A. v. Lethe*, 312 F.Supp. 421 (E.D. Calif. 1970).

CONCLUSION

The United States Congress, in Public Law 90-100, found the traffic in obscenity and pornography to be a "matter of national concern". The Federal Government was deemed to have a "responsibility to investigate the gravity of this situation and to determine whether such materials are harmful to the public, and particularly to minors, and whether more effective methods should be devised to control the transmission of such materials". To this end, the Congress established an advisory commission whose purpose was "after

a thorough study which shall include a study of the casual relationship of such materials to antisocial behavior, to recommend advisable, appropriate, effective and constitutional means to deal effectively with such traffic in obscenity and pornography".

Approximately Two Million (\$2,000,000.00) Dollars was given to the advisory commission for this purpose, three-quarters of which went for scientific research to various contractors on physiological and psychological effects and public opinion surveys regarding sexually oriented materials.

The overwhelming evidence was to the effect that voluntary exposure to sexually oriented materials, whether films or books, caused no harmful antisocial conduct. Approximately nine (9) technical volumes of the Commission on Obscenity and Pornography have been printed by the U.S. Government Printing Office, containing the reports and research data gathered by the Commission, supporting these findings.

After reviewing the wealth of scientific data accumulated in the research sponsored by the Commission under the mandate from Congress, a clear overwhelming majority of the Commissioners recommended the abolition of all laws relating to civil or criminal suppression of any sexually oriented materials, except, as said laws, Federal and State, could be narrowly limited by judicial interpretation to those instances where the circumstances of dissemination intrude into the privacy of others, and where there is no reasonable precaution taken against exposure to juveniles.

An authoritative judicial construction could, and should be rendered by this Court, assimilating into the case law such a limiting statutory construction, as being appropriate in light of *First Amendment* guarantees.

Therefore, Petitioners respectfully pray this Court to reverse the judgment of the Supreme Court of the State of Georgia for the reasons indicated in both the Petition for Certiorari and Brief submitted herewith by said Petitioners.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-1051

PARIS ADULT THEATRE I, ET AL,
Petitioners,

v.

LEWIS R. SLATON, DISTRICT ATTORNEY,
ATLANTA JUDICIAL CIRCUIT, ET AL,
Respondents.

On Writ Of Certiorari From The
Supreme Court of Georgia

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1971

NO. 71-1051

PARIS ADULT THEATRE I, ET AL,
Petitioners,

v.

LEWIS R. SLATON, DISTRICT ATTORNEY,
ATLANTA JUDICIAL CIRCUIT, ET AL,
Respondents.

On Writ Of Certiorari From The
Supreme Court of Georgia

RESPONDENTS' BRIEF

OPINIONS BELOW

The Order of the Trial Judge in the Superior Court of Fulton County is not reported and is found on pages 33 and 34 of the Appendix herein. The decision of the Supreme Court of Georgia and the Order denying the Motions for a Rehearing are found on pages 1 through 5 and 14 of the Appendix, respectively. The decision of the Supreme Court of Georgia is reported at 228 Ga. 343, 185 S.E.2d 768 (1971).

QUESTIONS PRESENTED

1. The two (2) motion picture films which are the subject matter of these proceedings, and determined by the Supreme Court of Georgia to be obscene, are obscene in the Constitutional sense and are therefore not protected expression under the First Amendment of the United States Constitution.

2. The determination and judgment of the Georgia Supreme Court finding each of the films to be obscene and "hard core pornography" does not violate Petitioner's rights to procedural and substantive due process required by the Fifth and Fourteenth Amendments to the Constitution of the United States.

3. The procedure employed in the adversary hearing was proper and consistent with the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

4. Whether the display of any sexually oriented films in a commercial theatre, when surrounded by notice to the public of their nature and by reasonable protection against exposure of the films to juveniles, is constitutionally protected.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and the Code of Georgia, § 26-2101, are found in Appendix D of the Petition for a Writ of Certiorari.*

STATEMENT OF THE CASE

Respondents filed a Complaint in the Fulton Superior Court against Paris Adult Theatre I and Paris Adult Theatre II alleging that Defendants were exhibiting and showing to the general public for an admission charge a 16-millimeter motion picture film entitled "It All Comes Out In The End," in one theatre, and a 16-millimeter motion picture film entitled "Magic Mirror" in the other, each of which were alleged to be obscene within the definition of Georgia Code Section '26-2101 and their exhibition prohibited by that section. (A-21, 38)

In each of the cases Respondents demanded that a Rule Nisi issue; that, after a hearing upon the question and issue of obscenity, each of the films be declared obscene and subject to seizure; and, that the Defendants be temporarily and permanently enjoined from exhibiting the said films within the jurisdiction of the Court. Respondents further prayed for a temporary injunction, temporarily restraining and enjoining Defendants from concealing, destroying, altering or removing the motion picture films from the jurisdiction of this Court. (A-38, 39, 40). A temporary injunction was granted by the Court, and the Defendants were further ordered to have one (1) print each of the films, as they were exhibited on the 28th day of December, 1970, in Court on the 13th day of January, 1971, together with the proper equipment for viewing the same. (A-40, 41)

On the 13th day of January, 1971, the films were produced by Defendants after one of the Defendants served had been held in contempt for refusing to furnish the films on the grounds to do so might incriminate him. (A-48)

The parties stipulated and agreed to waive a jury trial and a preliminary hearing, and stipulated that the judg-

ment and order entered by the Trial Judge would be a Final Judgment and Order in each case. (A-89)

The parties further stipulated that certain photographs which were taken shortly before the hearing, correctly portrayed the outside of Paris Adult Theatre I and Paris Adult Theatre II as they existed on December 28, 1970, with the exception of the titles therein exhibited.

Each of the films were exhibited to the Trial Court. (A-50)

Evidence revealed that the theatres carried the legend on the outside that the films were for "Adults Only"; and, that "You Must Be 21 And Able To Prove It. If Viewing The Nude Body Offends You, Do Not Enter." (A-84, 85)

Ira W. Brown testified that he viewed the motion picture "It All Comes Out In The End" at the Paris Adult Theatre on December 28, 1970, and paid an admission charge of Three and No/100 (\$3.00) Dollars to enter the theatre. (A-50)

Mr. Brown further testified that there was nothing on the outside that would indicate that acts of fellatio, cunnilingus or group sexual intercourse would be exhibited in that film. (A-52)

Evidence further revealed that no legend or other type of warning was exhibited outside the theatre which would forewarn the general public as to the contents of the film entitled "Magic Mirror." (A-57)

Mr. C. R. Little testified that he viewed the film "Magic Mirror" in its entirety on December 28, 1970; and that nothing was exhibited on the outside of the theatre that warned him what the contents of the film would be, other than the fact that adult movies were being shown in the

theatre. There was nothing on the outside of the theatre that indicated or suggested that acts of fellatio or cunnilingus or other erotica were contained in the films so exhibited. (A-57, 58) Mr. C. R. Little was then asked if in his opinion the film "Magic Mirror" had any social redeeming value, but he was not allowed to answer because of defendant's objection that Mr. Little had not been qualified as an expert. (A-58)

At the conclusion of the evidence the Trial Court took under advisement Motions to Dismiss filed by Respondents and subsequently did sustain the said Motions and dismiss Respondents' Complaint. (A-33, 34) This judgment was reversed by the Supreme Court of Georgia on November 5, 1971, after each Justice viewed each film in its entirety (A-5) and petitions for rehearing were denied on November 18, 1971. (A-1, 14)

IT ALL COMES OUT IN THE END

The film begins by showing two males as they leave a building, get into a convertible and drive down the street. Then there is a scene which shows several women's garments lined up on the floor in an apartment hallway, then the scene returns to the convertible as the credits come onto the screen showing the title of the film, "IT ALL COMES OUT IN THE END."

The opening scene, after the credits, shows two completely naked females fondling and caressing each other. The next scene cuts back to the two men in the automobile, and then returns to the two females who are now seated on a bed. (The two females are completely naked, and they are fondling and caressing each other.) The scene then shifts back to the two males riding in the automobile, and then returns to the two females on the bed. (One fe-

male is kissing the other female around her pubic area.) The scenes continue to shift back and forth between the two males in the automobile and the two females on the bed. One female is shown as she performs the act of cunnilingus upon the other female. The females then change positions, and simultaneous acts of cunnilingus are depicted. (One female performs cunnilingus upon the other female as the other female simultaneously performs cunnilingus upon the first female.) The scenes then continue to shift back and forth between the two males riding silently in the automobile and the two females writhing in lesbianic activities on the bed. The two females are now moaning and groaning in sensual pleasure: they continue to stimulate each other until they each sustain a sexual climax and then relax on the bed satiated by their efforts. One female then decides that she needs a sexual change for awhile, and the other female suggests that what she needs is a man instead of a woman for a sexual partner. The two females then decide that they will go out and find some men. The scene then changes to a yacht club waterfront where the two girls are searching for companionship. One of the females, female no. 1, goes down to the dock area and is sitting on a yacht. The scene now switches to the two men in the car as they arrive in the dock area of the yacht basin. The two males leave the automobile and walk away in opposite directions. One of the males, male no. 1, then encounters the female sitting on the yacht. They strike up a conversation and she invites him to her apartment for coffee. The next scene shows the male and the female in her apartment. The other female, female no. 2, now returns to the apartment; she is accompanied by another male, who is male no. 2, the companion of male no. 1. The two males are the same two males that appeared in the automobile earlier. The

scene then shifts to the kitchen where female no. 2 and male no. 2 are talking about female no. 1 and male no. 1. They then return to the living room. The scene then changes to a bedroom as female no. 1 is showing male no. 2 the view from the window. Male no. 2 begins to undress. Female no. 1 resists and male no. 2 rips off her clothes. The scene then changes back to the living room and depicts female no. 2 performing a dance for male no. 1. The scene then shifts back to the bedroom where male no. 2 is forcing female no. 1 to consort with him on the bed. He is shown kissing and caressing the breasts and pubic area of the female. The scene then shifts back to the living room where female no. 2 is completely undressing before male no. 1. She continues to dance provocatively before him. The scene then shifts back to the bedroom as the unwilling female no. 1 continues to resist the physical demands of male no. 2. The scene in the bedroom then shows female no. 1 as she performs fellatio upon male no. 2. The scene continues to shift back and forth between the bedroom and the living room. The next scene shift shows the couple in the bedroom engaged in sexual intercourse in the male above position. The scene then returns to the living room to where female no. 2 is shown undressing male no. 1. At this point both the couple in the living room and in the bedroom are completely naked. The next scene shows female no. 2 as she performs fellatio upon male no. 1, and the scene ends as the male experiences a sexual climax. The scene shifts back to the bedroom where the other couple is engaged in sexual intercourse in the male above position. The scene in the bedroom then depicts the female performing fellatio on the male. The film again shows the couple in the bedroom engaged in sexual intercourse in the male above position, until they experience a mutual sexual climax and embrace.

The scene then shows female no. 2 talking to male no. 2. The two males patch up the argument that they have had previously and renew their homosexual friendship. The next scene shows the two females writhing in lesbianic ecstasy on the bed, their legs intertwined, rubbing their genitals together. The next scene shows a prolonged orgy between both couples on the bed. During this orgy both males are depicted as they perform cunnilingus upon the females. Then, as one male performs cunnilingus upon his partner, the other couple is engaged in sexual intercourse. (In the male above position). The scene then changes again to the waterfront as the film ends.

MAGIC MIRROR

The motion picture begins with a scene depicting a female browsing in an antique store. The female is conversing with the shop proprietor concerning the prices of the merchandise. She shows an interest in a particular mirror and is told that the mirror has magical powers. The female purchases the mirror and the next scene opens in the female's apartment. She is having difficulty operating her TV set. A TV repairman arrives and diagnoses the problem as the set being unplugged. She goes into the bedroom to obtain the money to pay the TV repairman and glances into her newly acquired mirror. There is a flashback, as her image in the mirror fades, and the next scene shows the female completely nude and the TV repairman completely nude as they apply shaving cream to each other's body. The next scene switches camera shots back and forth as the cream is being applied to the female's breasts and pubic area and to the male's pubic area. This is followed by a scene showing the male and the female applying shaving cream to their entire

bodies. The male then reclines on his back on the floor, and the female mounts him in the female above position as the film shows the male fondling and caressing the female's breasts. The next scene shows them horizontally sliding up and down on each other. After several minutes of this they change to the male above position and engage in sexual intercourse. The next scene shows them writhing and embracing. The following scene shows them engaged in simultaneous acts of fellatio and cunnilingus (the female performs fellatio on the male while simultaneously the male performs cunnilingus upon the female). The scene then fades back from the flashback into the female's bedroom as she pays the TV repairman some money. The television repairman then leaves the apartment and the scene changes—a knock is heard at the door and the female answers. Two other females enter the apartment: they are circulating a petition. They represent the anti-smut society (ASS) and ask the original female to sign the petition. The two new females then admire the antique mirror; and, as they gaze into it, the film fades to another flashback. The next scene shows the two new females completely nude reclining on the floor and passionately embracing. One female mounts the other in the female above position and they caress and fondle each other. The next scene shows the two females as they embrace and kiss each other's breasts and pubic areas. One female is then viewed as she performs cunnilingus upon the other female, as shown by thrusting her head and mouth between the widespread legs of the other female; while, at the same time, the other female performs cunnilingus upon her. They then change positions and simultaneous cunnilingus is performed again. The two females then cross legs with each other, rub their genital areas together, and gyrate while in this position. The next scene depicts one female

as she performs cunnilingus upon the other, while the other massages her own breasts. The scene then fades back to the female's apartment and the two females that are gathering signatures for the petition are shown as they leave the apartment. The next scene is again in the female's apartment, where the original female and another male, who are both fully clothed, are practicing some dancing. (They are dressed in evening wear attire.) As they dance past the mirror they both stare into it and the scene begins the fade into a flashback. The next scene opens with two males and two females who are dancing. As they dance the females are disrobed by their male partners. The males are also disrobed by their female partners. At this point the four participants are completely naked as they then switch partners and continue to dance. Male no. 1 is shown as he performs cunnilingus upon female no. 1. Female no. 1 then performs fellatio upon male no. 1. They continue to dance for awhile; and, finally all four fall to the floor as both males perform cunnilingus upon their individual female partners. The couples are then shown as they engage in sexual intercourse with the females sitting in the laps of the males. At this point they all gather together on the floor and switch partners again. The scene that follows depicts one male performing cunnilingus upon a female, while, at the same time, the female performs fellatio upon the other male. A sexual orgy ensues between the four in which acts of cunnilingus and fellatio are performed between all parties simultaneously. The scene then shows sexual intercourse engaged in by both couples in the male above position. The film then depicts a sexual orgy in which acts of sexual intercourse, fellatio and cunnilingus are performed repeatedly and continuously. The scene then fades back to the female's apartment where the female and her male escort

are shown as they leave the apartment. The next scene shows female no. 1 asleep on the couch in her apartment. The front door opens and a male enters surreptitiously. (The room is completely dark except for a lighted table lamp.) The male finds the female's pocketbook on the table and begins to empty it. While doing this, he drops the pocketbook and the female awakes. He produces a revolver and forces the female to lie down as he binds her hands with rope and then instructs her to get her jewelry. At this point a policeman in uniform comes into the apartment and begins to apprehend the robber. At this point the female is shown reflected in the mirror as the scene begins to fade into a flashback. The next scene shows the robber and the policeman completely naked as they caress and fondle the completely naked female. The two men push each other away from the female. After a few minutes of this, the robber hits the policeman on the chin and knocks him out. The robber then embraces and caresses the female without the interference of the policeman. They then engage in sexual intercourse in close proximity to the unconscious policeman. At one point they are engaged in sexual intercourse in the female above position as the robber is lying across the policeman's body. After this the policeman begins to regain consciousness; and, as he comes to, the previous act is repeated and the policeman now begins to fondle and caress the female. The two males are then shown as they continue to fondle and caress the female; and the policeman is shown performing the act of cunnilingus upon the female, while at the same time the robber fondles and caresses the breasts of the female. The female is then shown as she performs fellatio upon one male and then the other. The policeman then caresses and licks and kisses the feet and toes of the female as the robber caresses and kisses her breasts. Then

the males change positions and the robber licks and kisses the feet of the female as the policeman fondles and caresses and kisses her breasts. The scene then fades back to the apartment of the female where a fight breaks out between the policeman and the robber. As they struggle together the policeman draws his revolver and shoots the robber in the stomach. Blood is seen gushing from the wound in the robber as it spills onto his clothes and onto the floor. The policeman then leaves to report to headquarters and the female then notices that the mirror has been broken in the struggle. This is the end of the film.

1. **THE TWO (2) MOTION PICTURE FILMS WHICH ARE THE SUBJECT MATTER OF THESE PROCEEDINGS, AND DETERMINED BY THE SUPREME COURT OF GEORGIA TO BE OBSCENE, ARE OBSCENE IN THE CONSTITUTIONAL SENSE AND ARE THEREFORE NOT PROTECTED EXPRESSION UNDER THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.**

The photographs of the outside of Paris Adult Theatres I and II clearly established the total lack of forewarning to prevent potential intrusion into the privacy of unsuspecting adults who wish to avoid confrontation with erotic material. The modest legend on the exterior of the premises simply provided that the material "Is For Adults Only And You Must Be 21 And Able To Prove It. If Viewing The Nude Body Offends You—Please Do Not Enter." (A-85)

This legend would not forewarn the public; nor does it even suggest that the films in question depicted fellatio,

cunnilingus, sexual congress, lesbian activities or homosexuality. At most the legend would suggest that the films only portrayed and exhibited nude scenes and pictures, such as are contained in "girlie" magazines, which this Court has ruled are constitutionally permissible under the Doctrine of *Redrup v. New York*, 386 U.S. 767, 87 S.Ct. 1414 (1967), as explained and construed in *Milky Way Productions, Inc. v. Leary*, 305 Fed. Supp. 288, 293, affirmed 397 U.S. 98, 90 S.Ct. 817 (1970).

In the Supreme Court of Georgia, Petitioners contended that, because of the legend appearing outside the theatre, as hereinabove set forth, the exhibition of the films in this context is permissible; and, that the State cannot, without violating First Amendment Rights, constitutionally prohibit it.

They relied in support of this position upon the case of *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243 (1969), and other federal and state cases following it. *United States v. Reidel*, 402 U.S. 351, 91 S.Ct. 1410 (1971) and *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 91 S.Ct. 1400 (1971), expressly limited the scope of *Stanley* and discredited the decisions which would so expand it. In *United States v. Reidel* this Court said:

"He (Reidel) has no complaints about governmental violations of his private thoughts or fantasies, but stands squarely on a claimed First Amendment right to do business in obscenity and use the mails in the process. But *Roth* has squarely placed obscenity and its distribution outside the reach of the First Amendment and they remain there today. *Stanley* did not overrule *Roth* and we decline to do so now." 402 U.S. 351, 356.

The myriad of cases relied upon and cited by Petitioners in regard to this point clearly involved interpretation of different statutes, "girlie" magazines, and some motion picture films which are, in fact, borderline cases at the most, and the subject matter of which is in no way comparable to the motion picture films involved in this case.

For an example, Petitioners cite and rely heavily upon *Burgin v. South Carolina*, 178 S.E.2d 325, reversed 404 U.S. 806 (1971). The *Burgin* reversal was based upon *Redrup v. New York*. Counsel for the Petitioners in this case was also counsel for *Burgin*. On Page 12 of Petitioners' Petition for a Writ and Argument to this Court *Burgin* urged:

"It seems perfectly clear that this Court in offering a workable solution for the lower Courts in obscenity litigation, civil or criminal, in rem or in personam, has restricted the determination of obscenity vel non to those materials depicting sexual activities." (Emphasis added)

The evidence in *Burgin* consisted of several "girlie" magazines. *Burgin* stated on Page 11 of his Petition for Writ of Certiorari:

"These publications are indistinguishable from those involved in many of the decisions of the Supreme Court based upon the principles set forth in *Redrup v. New York*, 386 U.S. 767. Take for example, the materials found not obscene for willing adults in *Bloss v. Dykema*, 389 U.S. 278, as recently as June 1, 1970. In neither is there any depiction of sexual congress." (Emphasis added)

The Petitions for Writ of Certiorari in *Burgin*, and the other cases cited and relied upon by Petitioners in this

case, themselves distinguish clearly between the material involved in this case and the other cases relied upon.

Since *Redrup v. New York* supra, this Court has reversed some thirty-three cases citing *Redrup* as its only authority. One notable exception has been *G.I. Distributors, Inc. v. New York*, 20 NY 2d 104, 281 NYS 2d, 795, cert. denied (389 U.S. 905, 88 S.Ct., 218 (1967).) *G.I. Distributors* came to this Court within a month after *Redrup* and immediately after the first thirteen (13) reversals. (June 12, 1967). *G.I. Distributors* involved sexual activity missing in the *Redrup* reversals to date and cited by Petitioner. The lower Court described the materials as follows:

"The pamphlet contains 70 full page photographic reproductions including the covers. There is no text except for two pages of advertising data with reference to subscriptions for photographic prints, and the centerleaf containing advertising blurbs or "reviews" of two books, entitled "Kept Boy" and "Dial P for Pleasure". All of the photographs are of two or more young men, and in nearly all, in various stages of undress or nudity, engaged in attitudes of embracing, wrestling, spanking, beating or enforced disrobing of one of the young men."

"Two of the photographs portray one young man manually soap-lathering the genitalia of the other. One portrays a young man trying to seize the genitalia of another. Two portray the young men in embrace posture consonant with and suggestive of an act of pederasty. There are three nude spanking scenes. There are several others depicting sadistic assaults. The disrobing and wrestling scenes are strongly suggestive of activity directed toward expo-

sure or seizure of genitalia. These photographs in the context of the others in the pamphlet indicate that the pamphlet taken as a whole is designed to portray a full range of sexual behavior between young males from byplay to pederasty."

Clearly the films in the instant case go beyond any of the materials in the cases cited by petitioner and even beyond the materials in *G.I. Distributor's, Inc.* supra.

"Magic Mirror" and "It All Comes Out In The End" depict sexual congress in every manner and method known to man, and are clearly and easily distinguishable from the material involved in *Burgin* or in any of the other cases which were reversed by this Court, per curiam, citing *Redrup* as authority.

There is no pretext of social value present in the instant case. The plot of each film is only used to present continuous scenes of sexual activity. Both films are "patently offensive" and their "indecentcy speaks for itself." *Memoirs v. Massachusetts*, 383 U.S. 419, 86 S.Ct. 975 (1966). The films have no pretense of artistic value; they graphically depict acts of sexual intercourse, including various acts of sodomy and involve several participants in scenes of "orgy-like character". *Ginzburg v. U.S.*, 383 U.S. @ 463, 499, Fn3, 86 S.Ct. 942 (1966).

Petitioner insists that in light of the *Redrup* reversals any material, even if obscene, is protected unless one of the three significant factors in *Redrup* is present. However, a reading of *Redrup* and *Ginzburg*, supra, clearly puts this hypothesis to rest. In *Ginzburg* this Court said that pandering was the significant factor in tipping the scales in a "weak" prosecution.

"They (Ginzburg) proclaimed its obscenity; and we cannot conclude that the Court below erred in taking their own evaluation at its face value and declaring the book as a whole obscene despite the other evidence." 383 U.S. 463, 472.

Redrup, supra, pointed out that the Court was mistaken as to the materials involved; and there was no conduct on the part of the Defendant to support an affirmance of his conviction.

"The Court originally limited review in these cases to certain particularized questions, upon the hypothesis that the material involved in each case was of a character described as "obscene in the constitutional sense," in *Memoirs v. Massachusetts*, 383 U.S. 413, 418, 16 L ed 2d 1, 5, 86 S.Ct. 975. But we have concluded that the hypothesis upon which the Court originally proceeded was *invalid*, and accordingly that the cases can and should be decided upon a common and controlling fundamental constitutional basis, without prejudice to the questions upon which review was originally granted. We have concluded, in short, that the distribution of the publications in each of these cases is protected by the First and Fourteenth Amendments from governmental suppression, whether criminal or civil, in personam or in rem."

In no manner does *Redrup* reverse *Roth*. If material is obscene, it is not constitutionally protected and can be regulated by the various States notwithstanding the conduct of the defendant in his commercial distribution of the material. All that the *Redrup* reversals mean is that particular material in each case is not obscene under *Roth*, absent a showing of some conduct on the part of the defendant to justify affirmance.

In the case of *Wisconsin v. Amato*, 49 Wis. 2d 638, 183 N.W. 2d 29, certiorari denied January 24, 1972, 30 L.Ed. 2d 751, rehearing denied, 31 L.Ed. 2d 257, the Supreme Court of Wisconsin held:

"In support of their contention that the three (3) magazines here involved are, as a matter of law not obscene. Defendants describe the materials involved in several per curiam '*Redrup Reversals*'. While a few of these cases — notably *Central Magazine Sales Ltd. v. United States* (1967), 389 U.S. 50, 80 S.Ct. 235, 19 L.Ed. 2d 49, may have involved magazines bearing similarity to one of the magazines herein involved, the other cases dealt with books, films and other items bearing no resemblance to the instant materials."

The Court continued:

"The Appellants contend that the decision in *Redrup* modifies the use and scope of the *Roth Memoirs Test*. They argue that magazines such as those involved in this case may not serve as a basis for obscenity prosecution unless it can be shown that: (1) They were sold to minors; or (2) They were so obtrusively displayed as to cause unwilling viewers to see them; or (3) They were pandered in the manner described in *Ginzburg*.

We do not agree. *Redrup* is authority only for the proposition that the particular books and magazines there involved were not obscene. *We think that if the Redrup decision was intended to reverse the Roth-Memoirs Test, that obscenity is not constitutionally protected speech, the Court would have so stated in no uncertain terms. (Emphasis Added)**

We conclude that *Redrup* is strictly limited to the question of obscenity of the specific materials there under consideration."

The Supreme Court of Georgia in its decision in this case, *Slaton v. Paris Adult Theatre*, 228 Ga. 343; 185 S.E. 2d 768, 769, held:

"As we view the holding in the *Reidel* case, it is dispositive of the Appellees' contention, and the ruling of the Trial Court that the showing of these films in a commercial theatre under the circumstances shown in this case is constitutionally permissible. The Defendants in this case were making sales and delivery of the films involved in the only practical way in which it could be done, that is, by selling to the public the right to come into their theatre and view the showing of such films. No reason exists why the sale and delivery of these films should be immune to State control any more than the sale and delivery of multiple copies of an obscene book, pamphlet or magazine. Those who choose to pass through the front door of the Defendant's theatre and purchase a ticket to view the films and who certify thereby that they are more than twenty-one (21) years of age are willing recipients of the material in the same legal sense as were those in the *Reidel* case, who, after reading the newspaper advertisements of the material, mailed an order to the Defendant accepting his solicitation to sell them the obscene booklet involved there. That case clearly establishes once and for all that the sale and delivery of obscene material to willing adults is not protected under the First Amendment."

Georgia Code Annotated 26-2101 is held to be constitutional and within the purview of the First and Fourteenth Amendments to the United States Constitution. *Gable v. Jenkins*, 309 Fed. Supp. 998, affirmed; 397 U.S. 592. The motion picture films here involved are clearly obscene in a constitutional sense, and they are not protected expression under the First and Fourteenth Amendments to the United States Constitution. Each of the said films offends every section of Georgia Code Section 26-2101.

2. THE DETERMINATION AND JUDGMENT OF THE GEORGIA SUPREME COURT FINDING EACH OF THE FILMS TO BE OBSCENE AND "HARD CORE PORNOGRAPHY" DOES NOT VIOLATE PETITIONER'S RIGHTS TO PROCEDURAL AND SUBSTANTIVE DUE PROCESS REQUIRED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The Theatres objected to all efforts by the Respondents to introduce evidence of the *Roth-Memoirs Tests* of Obscenity and should not be allowed to complain of the Trial Court's ruling. (A-58)

However, the authoritative judicial decisions do not require such evidence in all cases.

In *U.S. v. Groner* ____ F.2d ____ No. 71-1091 CA-5 11-11-72 relied upon by Petitioner the Court said:

"We are not prepared to go so far as to say that introduction of such evidence (expert) is necessary on *all* the elements of obscenity in *all* such cases."

The Court in *Groner* distinguishes *Kahm v. United States*, 300 F.2d 78 (5th Cir. 1962) by the materials involved in both cases. In *Kahm* the material was graced with no plot, no character development, and no exemplification of independent literary effort, while, the material in *Groner* possessed all the aforementioned attributes. *Kahm v. U.S.*, *supra*, held that expert evidence was not required to sustain a conviction in a case where the jury does not have to weigh the literary, artistic or social values of a work against certain off color passages. The Court reasoned:

"It is plain to us that when the jury was instructed by the trial court in language such as that approved by the Supreme Court in the *Roth* case, it was fully capable of applying those standards and that charge to the materials shown to have been mailed here. Nothing is more common than for a jury in a case involving charges of negligence, as for example negligent homicide, to determine whether the proven conduct measures up to the standards of a reasonably prudent man. We think it may fairly be said that no amount of testimony by anthropologists, sociologists, psychologists or psychiatrists could add much to the ability of the jury to apply those tests of obscenity to the materials here present."

The Court in *Kahm* was simply reiterating the rule laid down in *Roth* when this Court approved the following jury instruction:

"... The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or would

leave another segment, the scientific or highly educated or the so-called wordly-wise and sophisticated indifferent and unmoved . . .

"The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by present day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards." *Roth v. U.S.* 354 U.S. 476.

The motion picture films themselves are the highest and best evidence of what they contain. *U.S. v. Wild*, 422 Fed 2d 34; certiorari denied April, 1971, 9 Cr.L. 4046; *Womack vs. U.S.*, 111 U.S. app. D.C.8 294 F. 2d 204 (1961). In the case of *United States v. Robert Brown*, 328 Fed. Supp. 196, United States District Court, Eastern District of Virginia, Norfolk Division, decided June 9, 1971, the Court held at Page 199;

"The real issue in this case, of course, is whether these two (2) books are actually obscene. The Supreme Court has held, more than once, that obscenity is outside the scope of First Amendment protection."

*** "Brown argues that this Court must acquit him because the government presented no expert testimony that the two (2) books are obscene. As author-

ity for this position Brown relies on *United States v. Klaw*, 350 Fed. 2d 155 (2d Cir. 1965), which does indicate some of the problems involved in determining questions of prurient interest and contemporary community standards. Specifically, the problems include 'how', 'by whom', and 'on what basis' these determinations are to be made. *Klaw*, however, is not controlling here for as the Second Circuit Court of Appeals subsequently pointed out, the particular facts in *Klaw* required such testimony. *United States v. Wild*, 422 Fed. 2d 34 (2d Cir. 1969). The two (2) books named in this indictment appear to be substantially different from the materials discussed in *Klaw*. *** Judge Lumbard stated in *Wild*, 'The question of obscenity can be disposed of merely by stating that these slides are unquestionably hard core pornography. *** There is no conceivable claim that these color slides have redeeming social value.*** Hard core pornography such as this can and does speak for itself.' 422 F.2d at 35-36. And in *Ginzburg v. United States*, 383 U.S. 463, 465, 86 S.Ct. 942, 944, 16 L.Ed. 2d 31, the Court said that in the cases in which it has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question."

See also *New York v. Abronovitz*, 310 N.Y. Supp. 2d 698, and *New York v. Buckley*, 320 N.Y. Supp. 2d 91.

Experts are not required for a successful prosecution. *United States v. 392 Copies of Magazine Entitled "Exclusive"*, 253 F. Supp. 485, 493 (D.C., 1966); *United States v. Davis*, 353 F. 2d 614, 615 (2d Cir. 1965), cert. den. 384 U.S. 953, 86 S.Ct. 1567; *People v. Finhelstein*,

111 N.Y. 2d 300, 306-307, 229 N.Y.S. 2d 367 (1962); *People v. Kirkpatrick*, 316 NYS 2d 37.

In *State v. Carlson*, 192 N.W. 2d 421 (1971), the Court held at Page 425:

"There is no need for expert assistance for a jury to determine contemporary community standards and whether the film lacks social value. The films speak for themselves as evidence of their obscenity. No amount of testimony by psychoanalysts, psychologists or anthropologists would be any more reliable on the question of whether the films affront contemporary community standards than the opinion of the jurors in this case."

In the instant case, there was no jury determination; A jury was waived, and a judge made the determination. On appeal the trial judge was reversed. If expert testimony had been presented to the trial judge it is clear that such testimony would not have been binding on the Court. The trier of fact could disregard it entirely or give it such credence as he saw fit. *Boyd v. The State*, 207 Ga. 567, 63 SE 2d 394; *Clark v. The State*, 224 Ga. 311, 161 SE 2d 836. On appeal the Supreme Court of Georgia after viewing each of the films in their entirety, made an independent determination of obscenity, as it is required under the law to do. *Roth v. United States*, *supra*, 354 U.S. @ 497-498, 77 S.Ct. 1304; *Kingsley Intern. Pictures Corp. v. Regents*, 360 U.S. 684, 708, 79 S.Ct. 1362, 3 L. Ed.2d 1512 (1959); *Manual Enterprises v. Day*, *supra*, 370 U.S. 488, 82 S.Ct. 1432, 8L.Ed.2d 639; *Jacobellis v. Ohio*, 378 U.S. 184, 188, 190, 84 S.Ct. 1676, 12 L.Ed. 2d 793 (1964); *People v. Richmond County News*, *supra*, 9 N.Y. 2d p. 581, 216 N.Y.S. 370, 175 N.E.2d 682;

People v. Fritch, 13 N.Y.2d 119, 124, 243 N.Y.S. 2d 1, 5, 192 N.E.2d 713, 716 (1963). And like this Court in *Ginzburg v. United States*, *supra* the Supreme Court of Georgia looked only to the films themselves. This Court in *Ginzburg* said:

"In the cases in which this Court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question." 383 U.S. 463.

And likewise, expert testimony would not be binding on the Appellate Court. *Gornto v. McDougall*, 336 F. Supp. 1372 (1972). The decision of obscenity is solely for the Court on appeal. In final analysis the Court must be the expert in assessing the dominant theme, prurient interest, community standards, and social redeeming value, of the material involved. This decision is solely for the Court and it may not permit the usurpation of that function by the "expert" or the jury. *Memoirs v. Massachusetts*, *supra*, 383 U.S. pp. 450, 462, 86 S.Ct. 958.

It seems that on one hand there must be an independent de novo determination of obscenity at every step of the judicial process. See *Childs v. Oregon*, 401 U.S. 1000, 91 S.Ct. 1248 and the finding jury or trial judge is meaningless; while on the other hand if the trial court finding is one of acquittal, petitioner insists the appellate courts are freed from the duty of finding obscenity *vel non*. *Gornto v. McDougall*, 336 F.Supp. 1372 (1972) fn4.

Petitioner relies on *Klaw v. U.S. supra*. However, "Klaw is a special kind of case from which no general rule can be deduced," and it must be limited to the sado-masochistic type of material there involved, which is aimed at the sexual deviant. In such a case expert testi-

mony may very well be required to demonstrate whether the material appeals to the prurient interest in sex of that deviant segment, which knowledge would not be within the experience of a jury or judge. *United States v. Wild*, *supra*; p. 35 "*People v. Kirkpatrick*, 316 N.Y.S. 2d 37 (1971).

In the case of *Evans Theatre Corporation, et al. v. Slaton*, 227 Ga. 377, certiorari denied November, 1971, the Court observed:

"In *Jacobellis v. Ohio*, 378 U.S. 184 (84 S.Ct. 1676, 12 L.Ed 2d 793), in an opinion concurred in by two (2) Justices of the United States Supreme Court, it was stated that the 'contemporary community standards' by which they must determine the issue of the Federal constitutional rights of those convicted of crimes involving alleged obscene material were national standards. This opinion did not suggest that State courts must have evidence of national standards of decency before them in order to make a determination as to whether material is obscene. The United States Supreme Court in the *Jacobellis* case made its determination as to whether the film there reviewed was obscene under 'national' community standards by viewing the film itself."

Is Not The Supreme Court of Georgia Clothed With The Same Right, Authority And Responsibility To Make Such Determination By Viewing The Material Itself?

The *Evans* case involved the motion picture "I am Curious (Yellow)". By an equally divided Court, this Court affirmed, *Grove Press, Inc. et al. v. Maryland State Board of Censors*, 401 U.S. 480, 91 S.Ct. 966, which de-

cision declared the film "I am Curious (Yellow)" obscene.

In *Wisconsin v. Amato*, 49 Wis. 2d 638, certiorari denied January 24, 1972, 30 L.Ed.2d 751, rehearing denied 31 L.Ed.2d 257, also reported in 183 N.W. 2d 29, the Court held on Page 32:

"The Appellants contend that in the absence of affirmative proof of 'contemporary community standards' through expert testimony, the State cannot prevail. Several cases are cited in support of this contention. However, the Appellants concede that some Courts have held that affirmative proof on the issue of community standards is not necessary in obscenity cases. However, they contend that the decisions are in the minority, most are pre-*Redrup* and in many of them there is a finding that the material involved is hard core pornography, that is, *material which depicts sexual activity*. We believe that the mere existence of the magazines here involved was sufficient without expert testimony to present a jury question. We conclude that expert testimony is not required."

What Appellant is now attempting to do is apply the dictates of *Jacobellis* and to make them a Constitutional requirement of the type of evidence to be presented to the jury. Respondent submits that this impossible requirement is a far cry from *Smith v. California*, 361 U.S. 147, where even the most liberal members of the Court advocated allowance of such evidence by way of defense.

The first and only comment on evidentiary proof is found in Mr. Justice Harlan's concurring opinion in *Smith v. California*, 361 U.S. 147, where, in discussing the trial court's exclusion of appropriately offered testimony

through duly qualified witnesses regarding "the literary and moral criteria by which books relevantly comparable . . . are deemed not obscene," he advocates the admission of expert testimony and states:

The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates. This being so, it follows that due process "using that term in its primary sense of an opportunity to be heard and to defend a . . . substantive right," *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678, 74 L Ed 1107, 1112, 50 S Ct 451, requires a State to allow a litigant in some manner to introduce proof on this score. While a State is not debarred from regarding the trier of fact as the embodiment of community standards, it is not privileged to rebuff *all* efforts to enlighten or persuade the trier.

However, Mr. Justice Harlan there concludes by cautioning against imposing on the states the necessity of *proving* their case by the introduction of any particular kind of evidence:

However, I would not hold that any particular kind of evidence must be admitted, specifically, that the Constitution requires that oral opinion testimony by experts be heard. There are other ways in which proof can be made, as this very case demonstrates. Appellant attempted to compare the contents of the work with that of other allegedly similar publications, sold and purchased, and which received wide general acceptance. Where there is a variety of means, even though it may be considered that expert testimony is the most convenient and practicable.

method of proof, I think it is going too far to say that such a method is constitutionally compelled, and that a State may not conclude, for reasons responsive to its traditional doctrines of evidence law, that the issue of community standards, may not be the subject of expert testimony. I know of no case where this Court, on constitutional grounds, has required a State to sanction a particular mode of proof.

To require expert testimony as a constitutional requirement would usurp the appellate courts duty to independently apply the *Roth* standards. It would put the criminal process in this area in the hands of "experts." One Court in reviewing the trial court commented on the danger of experts:

"It was evident that, while these witnesses for both defense and prosecution testified as experts, many of them viewed their roles as advocates. All but one or two had a prior conviction concerning the undesirability or desirability of legislation in this area, and their primary interest was either in attacking or defending it. "Having in most cases chosen their sides as moralists," as Murray Kempton said in reviewing the Report of the Presidential Commission on Obscenity, "they seemed to feel the need to present themselves as utilitarians and to give weight to dubious research, which as practical men, they would be embarrassed to claim as the basis for sound principle." *U.S. v. New Orleans Book Mart, Inc.* 328 F. Supp. 136 (1971).

It is axiomatic in our system of justice that judges and juries understand the law and can apply it to the facts without assistance from anyone — "expert" or not.

It must therefore logically follow that if the Supreme Court of the United States may, by considering the material alone, hold that certain material is constitutionally protected by the First Amendment, as the Court has so ruled in its many *Redrup* reversals, then the Supreme Court of Georgia, in like manner, may find, as a matter of law, that the material and films involved in this case are obscene and are not protected by the First and Fourteenth Amendments to the United States Constitution, without the assistance of expert testimony.

3. THE PROCEDURE EMPLOYED IN THE ADVERSARY HEARING WAS PROPER AND CONSISTENT WITH THE FIRST, FOURTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

After the motion picture films "It All Comes Out In The End" and "Magic Mirror" had been viewed in their entirety, Respondents filed a Complaint against Paris Adult Theatre I and II; and a Rule Nisi was issued by the Fulton Superior Court directing the Theatres to appear on a day certain in order that an adversary hearing could be held to determine the question of obscenity. The Theatres were required to produce one (1) print of each of the motion picture films and the proper equipment for exhibiting the same to the Court. They were restrained only from concealing, altering, mutilating or destroying the said films or removing them from the jurisdiction of the Court.

The procedure employed by the Respondents in this case is far more protective of the Constitutional rights of the Exhibitors than is the procedure in any of the cases

cited by the Theatres or suggested in the Petition for Writ of Certiorari. No restraint whatsoever is placed upon the exhibition of the motion picture films involved until after a hearing is had thereon and the Courts have determined that the material is in fact and in law obscene. Until this determination is made the Exhibitors are free to continue exhibiting the films, as was done in this case; and, therefore, the length of time between the filing of the Complaint and the hearing operates to no detriment to the Exhibitor at all.

This procedure was first established in this District in *Gable v. Jenkins*, 309 Fed. Supp. 998, United States District Court, Northern District of Georgia, Atlanta Division, affirmed 90 S.Ct. 1351, wherein the Court held on Page 1001:

"There is a proper procedure existing in Georgia law that can achieve Constitutional standards, i.e., a prior adversary judicial proceeding before the seizure of the allegedly obscene items."

FOOTNOTE 3:

As examples, the following are presented: *** An order to show cause why the alleged obscene film is not obscene could be served on the possessor: ***.

This type of procedure was approved in *Metzger v. Percy*, 393 Fed. 2d 202 (7th Circuit 1968); *Tyrone v. Wilkinson*, 410 Fed. 2d 639 (4th Circuit 1969); *Bethview v. Kahn*, 416 Fed. 2d 410.

In each of the latter cases the Courts ordered the return of the alleged obscene material seized because no adversary hearing was held prior to the seizure of such materials. However, it is significant to note that the pos-

essor was ordered to make one print available to the State for prosecution purposes.

The procedure employed in the case at bar was approved by the Supreme Court of Georgia in the cases of *1024 Peachtree Corporation, et al v. Slaton*, 228 Ga. 102, 184 S.E.2d 144; *Walters v. Slaton*, 227 Ga. 676, 182 S.E.2d 464 (four cases); *Evans Theatre Corporation v. Slaton*, 227 Ga. 377, 180 S.E.2d 712.

The cases relied upon by the Petitioners are clearly distinguishable from the case at bar. The vice of *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, is not found in the Georgia procedure. The Constitution for the State of Georgia (2-115) provides:

"Liberty of speech or of the press guaranteed — no law shall ever be passed to curtail, or restrain the liberty of speech, or of the press; any person may speak, write and publish his sentiments, on all subjects being responsible for the abuse of that liberty."

The foregoing section of the Georgia Constitution was construed and fully explained in *K. Gordon Murray Productions v. Floyd*, 217 Ga. 784, 125 S.E. 2d 207 (1962).

Freedman involved a Board of Censors. The statute provides that it shall be unlawful to exhibit any motion picture film until the film has been submitted to and approved by the Maryland State Board of Censors.

The Chicago Motion Picture Ordinance involved in *Teitel Film Corporation v. Cusack*, 390 U.S. 139, 88 S.Ct. 754, prohibits the exhibition in any public place of "any picture . . . without having first secured a permit therefor from the Superintendent of Police." If the permit was de-

nied, the burden was on the Exhibitor to pursue the case through a series of Appeal Boards, all the while the picture could not be exhibited.

The same evil was found in *U.S. v. The Book Bin*, 306 Fed. Supp. 1023, affirmed 400 U.S. 410.

The precise question of whether or not obscenity can be controlled by injunction is not new to this Court, and has been decided adversely to Petitioner's contentions. In *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1956), this Court upheld the constitutionality of a New York statute authorizing the injunction of obscene prints and articles by the Supreme Court of New York, without a jury, upon the complaint of the chief executive or legal officer of any city, town or village. In said decision this Court stated:

"It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a qui tam action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice. See *Tigner v. Texas*, 301 U.S. 141, 148. If New York chooses to subject persons who disseminate obscene 'literature' to criminal prosecution and also to deal with such books as deodands of old, or both, with due regard of course, to appropriate opportunities for the trial of the underlying issue, it is not for us to gainsay its selection of remedies."

The procedure involved in the adversary hearing process employed in this case is fully protective of the Constitutional rights of the Exhibitors: No restraint whatsoever is placed upon the exhibition of the motion picture film involved until after a hearing is had thereon and the

essor was ordered to make one print available to the State for prosecution purposes.

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The procedure involved in the adversary hearing process employed in this case is fully protective of the Constitutional rights of the Exhibitors: No restraint whatsoever is placed upon the exhibition of the motion picture film involved until after a hearing is had thereon and the

Courts have determined its obscenity. Until such judicial determination, the Exhibitors are free to continue exhibiting the film or films as was done in this case.

The Supreme Court of Georgia found the films to be obscene because they are obscene.

4. WHETHER THE DISPLAY OF ANY SEXUALLY ORIENTED FILMS IN A COMMERCIAL THEATRE, WHEN SURROUNDED BY NOTICE TO THE PUBLIC OF THEIR NATURE AND BY REASONABLE PROTECTION AGAINST EXPOSURE OF THE FILM TO JUVENILES IS CONSTITUTIONALLY PROTECTED?

This Court requested the parties in this case to brief in argument the foregoing question in addition to the other questions presented in the Petition for the Writ of Certiorari.

Apparently the question was paraphrased and formulated upon the following portion of the Trial Court's Order:

"It appears to the Court that the display of *these films* in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of *these films* to minors, is constitutionally permissible." (Emphasis Added).

It should be noted that the Order of the Court made reference specifically to "these films" which are the subject matter of this litigation wherein the question, propounded by this Court to be briefed and argued is directed

to "any sexually oriented film". Therefore, for this limited purpose, the words "any sexually oriented film" must be construed to mean obscene films within the definition of *Roth-Memoirs*, otherwise no constitutional issue would be raised.

It should also be noted for the purpose of this argument that the question makes no reference to the "pandering" requisite enumerated in *Redrup v. New York*, 386 U.S. 767, 18 L Ed. 2d 515, 87 S.Ct. 1414 to be considered in borderline cases.

The question as posed follows closely the language used in the report of the Commission on Obscenity and Pornography which relates to "any sexually oriented film or material" which embraces the spectrum of hard-core pornography including sexual intercourse, sodomy and fellatio between human beings and horses, donkeys, dogs and pigs to the borderline *Redrup* material. Therefore the seriousness of this question cannot be stressed strongly enough.

This issue has been raised several times in the lower Courts and in the Appellate Courts either as an extension of the *Stanley Doctrine* or upon the misguided interpretation of *Redrup*, with no lasting success. The Trial Court apparently based its findings upon the thoroughly discredited and totally rejected recommendations and findings of the Commission on Obscenity and Pornography.

To answer the question as propounded affirmatively would, in effect, adopt the Commission report and repeal all Federal, State and local legislation prohibiting the sale, exhibition or distribution of obscene sexual materials to adults which the United States Senate categorically refused to do.

The Supreme Court of Georgia, when ruling on this case addressed itself to this question (which included the pandering element) and held:

"Appellees contend, and the judge of the superior court found that, inasmuch as the evidence in this case shows that the films which the solicitor seeks to seize are shown in a theater which carries on the front thereof the warning that it is for adults only and that "You must be 21 and able to prove it. If viewing the nude body offends you — PLEASE DO NOT ENTER," the exhibition of the films in this context is permissible and that the State cannot, without violating first amendment rights, constitutionally prohibit it. They rely in support of this position upon the case of *Stanley v. Ga.*, 394 U.S. 557, and other Federal and State cases following it. That case, however, is not authority for the position which appellees take. It dealt, not with the commercial distribution of pornography, but with the right of Stanley to possess, in the privacy of his home, pornographic films. In one of the most recent, if not the most recent, case decided by the Supreme Court of the United States dealing with this kind of material that court has expressly limited the scope of Stanley and has thereby effectively answered this contention of the appellees. *U. S. v. Reidel*, 402 U.S. 351, 28 L.Ed. 2d 813, 91 S. Ct. 1410. That case involved the distribution through the mails of an admittedly obscene publication in violation of 18 U.S.C. §1461. The material was mailed to recipients who responded to a newspaper advertisement which required the recipient to state in his order therefor that he was 21 years of age. Reidel was indicted, but the trial court

granted his motion to dismiss the indictment and, upon review, the Supreme Court, in reversing that judgment, reiterated the ruling in *Roth v. U. S.*, 354 U.S. 476, 1 L.Ed 2d 1498, 77 S. Ct. 1304, that "obscenity is not within the area of constitutionally protected speech or press." In so ruling, the Supreme Court expressly held that the government could constitutionally prohibit the distribution of obscene materials through the mails, even though the distribution be limited to willing recipients who state that they are adults, and, further, that the constitutional right of a person to possess obscene material in the privacy of his own home, as expressed in *Stanley*, does not carry with it the right to sell and deliver such material. As we view the holding in the *Reidel* case, it is dispositive of the appellees' contention, and the ruling of the trial court that the showing of these films in a commercial theater under the circumstances shown in this case is constitutionally permissible. The defendants in this case were making sales and delivery of the films involved in the only practical way in which it could be done, that is, by selling to the public the right to come into their theater and view the showing of such films. No reason exists why the sale and delivery of these films should be immune to State control any more than the sale and delivery of multiple copies of an obscene book, pamphlet or magazine. Those who choose to pass through the front door of the defendant's theater and purchase a ticket to view the films and who certify thereby that they are more than 21 years of age are willing recipients of the material in the same legal sense as were those in the *Reidel* case, who, after reading the newspaper advertisements of the

material, mailed an order to the defendant accepting his solicitation to sell them the obscene booklet involved there. That case clearly establishes once and for all that the sale and delivery of obscene material to willing adults is not protected under the first amendment."

The Supreme Court of Alabama in the case of *McKinney v. Alabama*, ___ Ala. ___, 254 So. 2d 714 in dealing with this question held:

"As their first point on appeal, appellants contend that by virtue of *Redrup v. New York*, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967), and the summary reversals based thereon, together with *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), they may engage in the commercial sale and distribution of obscene materials so long as there is no pandering, sale to minors, or an invasion of the privacy of others by their method of operation. Appellants are clearly in error. The United States Supreme Court's affirmances in *Milky Way Productions, Inc. v. Leary*, 305 F.Supp. 288 (S.D.N.Y. 1969), aff'd *New York Feed Co. v. Leary*, 397 U.S. 98, 90 S.Ct. 817, 25 L.Ed.2d 78 (1970), and *Gable v. Jenkins*, 309 F.Supp. 998 (N.D. Ga. 1969), aff'd 397 U.S. 592, 90 S.Ct. 1351, 25 L.Ed.2d 595 (both of which were decided subsequent to *Redrup* and *Stanley*), were affirmances of cases specifically holding that no additional tests for obscenity are required beyond the *Roth-Memoirs* standards. Shortly after appellant's brief was filed in this Court, the United States Supreme Court announced in *United States v. Reidel*, 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813 (1971), that the

Court was renewing its adherence to *Roth* and sharply limiting its prior holding in *Stanley*."

The Supreme Court of Virginia reached the same conclusion in the case of *Price v. Commonwealth*, ____ Va. ____, 189 S.E.2d 324.

The premise that the manner of distribution or dissemination was the controlling factor in obscenity cases, and not the obscene nature of the material itself blossomed from the misapplication and misconstruction of *Redrup v. New York*, 386 U.S. 767. *Redrup* was construed and explained in *Milky Way Productions, Inc. v. Leary*, 305 Fed. Supp. 288, 293 and was affirmed by this Court. 397 U.S. 98, 90 S.Ct. 817. On Page 293 the trial court held:

"(1) The main claim is that the definition of 'obscene' in § 235.00 (1) is invalid on its face because it embodies only the three 'tests' set out in *Memoirs v. Massachusetts*, 383 U.S. 413, 418, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966), as derived from *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), and intervening cases. Two more 'tests,' plaintiffs assert, were added by *Redrup v. New York*, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967) — that there be 'pandering' and 'foisting upon an unwilling public.'

"Plaintiffs misread the per curiam opinion in *Redrup*. As shown by the fuller opinions from which they derive, the supposedly additional, and allegedly essential, 'tests' are only *permissible* kinds of relevant evidence which may serve in a close case to tip the balance toward a finding of obscenity. The basic thought appears first in separate opinions of Chief Justice Warren. See *Roth* 354 U.S. at 495, 77 S.Ct. 1304 (concurring opinion); *Jacobellis v. Ohio*, 378 U.S. 184, 201, 84 S.Ct. 1676, 12 L.Ed.2d 793

(1964) (dissent). It takes firmer root in the opinion of Mr. Justice Brennan (joined by the Chief Justice and Mr. Justice Fortas), delivering the Court's judgment in *Memoirs, supra*, where he said (383 U.S. at 420, 86 S.Ct. at 978):

'On the premise, which we have no occasion to assess, that *Memoirs* has the requisite prurient appeal and is patently offensive, but has only a minimum of social value, the circumstances of production, sale, and publicity are relevant in determining whether or not the publication or distribution of the book is constitutionally protected. Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, must justify the conclusion that the book was utterly without redeeming social importance.'

It is therefore clear that the manner of dissemination of such materials is relevant only as permissible evidence to establish obscenity . . . It will not bring obscene material within First Amendment protection.

Notwithstanding *Milky Way*, experience cautions that a misunderstanding of *Redrup* and *Stanley* has cast some of the Trial Courts adrift upon the seas of legal uncertainty.

Perhaps the import of these decisions should now be transfixed by the harpoon of a clear and final decision by this Court.

In the case of *United States v. Reidel*, 91 S.Ct. 1410 (May 3, 1971), the case presented was whether § 1461 is constitutional as applied to the distribution of obscene materials to willing recipients who state that they are

adults. The District Court held that it was not constitutional and the Supreme Court disagreed and reversed that judgment stating:

"In *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), *Roth* was convicted under § 1461 for mailing obscene circulars and advertising. The Court affirmed the conviction, holding that 'obscenity is not within the area of constitutionally protected speech or press, id., at 485, 77 S.Ct. at 1309, and that § 1461, 'applied according to the proper standard for judging obscenity, do (does) not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited.' Id., at 492, 77 S.Ct. at 1313. *Roth* has not been overruled. It remains the law in this Court and governs this case. *Reidel*, like *Roth*, was charged with using the mails for the distribution of obscene material. His conviction, if it occurs and the materials are found in fact to be obscene, would be no more vulnerable than was *Roth's*.

Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed. 2d 542 (1969), compels no different result. There, pornographic films were found in *Stanley's* home and he was convicted under Georgia's statutes for possessing obscene material. This Court reversed the conviction, holding that the mere private possession of obscene matter cannot constitutionally be made a crime. But it neither overruled nor disturbed the holding in *Roth*. Indeed, in the Court's view, the constitutionality of proscribing private possession of obscenity was a matter of first impression in this

Court, a question neither involved nor decided in *Roth*. The Court made its point expressly: '*Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home.' Ibid. Nothing in *Stanley* questioned the validity of *Roth* insofar as the distribution of obscene material was concerned. Clearly the Court had no thought of questioning the validity of § 1461 as applied to those who, like *Reidel*, are routinely disseminating obscenity through the mails and who have no claim, and could make none, about unwanted governmental intrusions into the privacy of their home. The Court considered this sufficiently clear to warrant summary affirmance of the judgment of the United States District Court for the Northern District of Georgia rejecting claims that under *Stanley v. Georgia*, Georgia's obscenity statute could not be applied to book sellers. *Gable v. Jenkins*, 397 U.S. 592, 90 S.Ct. 1351, 25 L.Ed.2d 595 (1970).

The District Court ignored both *Roth* and the express limitations on the reach of the *Stanley* decision. Relying on the statement in *Stanley* that 'the Constitution protects the right to receive information and ideas *** regardless of their social worth.' 394 U.S. at 564, 89 S.Ct. at 1247, the trial judge reasoned that 'if a person has the right to receive and possess this material, then someone must have the right to deliver it to him.' He concluded that § 1461 could not be validly applied 'where obscene material is not directed at children, or it is not directed at an unwill-

ing public, where the material such as in this case is solicited by adults ***.'

The District Court gave *Stanley* too wide a sweep. To extrapolate from *Stanley's* right to have and peruse obscene material in the privacy of his own home a First Amendment right in *Reidel* to sell it to him would effectively scuttle *Roth*, the precise result that the *Stanley* opinion abjured. Whatever the scope of the 'right to receive' referred to in *Stanley*, it is not so broad as to immunize 'the dealings in obscenity in which *Reidel* engaged here — dealings which *Roth* held unprotected by the First Amendment.

The right *Stanley* asserted was 'the right to read or observe what he pleases — the right to satisfy his intellectual and emotional needs in the privacy of his own home.' 394 U.S. at 565, 89 S.Ct. at 1248. The Court's response was that 'a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thoughts of giving government the power to control men's minds.' Ibid. The focus of this language was on freedom of mind and thought and on the privacy of one's home. It does not require that we fashion or recognize a constitutional right in people like *Reidel* to distribute or sell obscene materials. The personal constitutional rights of those like *Stanley* to possess and read obscenity in their homes and their freedom of mind and thought do not depend on whether the materials are obscene or whether obscenity is constitutionally protected. Their rights to have and view that material in private are independently saved by the Constitution.

Reidel is in a wholly different position. He has no complaints about governmental violations of his private thoughts or fantasies, but stands squarely on a claimed First Amendment right to do business in obscenity and use the mails in the process. But *Roth* has squarely placed obscenity and its distribution outside the reach of the First Amendment and they remain there today. *Stanley* did not overrule *Roth* and we decline to do so now."

The holding in *Roth v. U.S.* 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (1957) that "obscenity is not within the area of constitutionally protected speech or press" was reaffirmed by this Court in the case of *United States v. Reidel*, 402 U.S. 351, 28 L.Ed.2d 813, 91 S.Ct. 1490 in which case this Court held that obscenity and its *distribution* are outside the reach of the First Amendment.

The question of distribution was met head-on and graphically answered by this Court in Reidel (Page 357) recognizing that the question addresses itself to the Legislative Branch of the government and not the Judiciary. This Court held:

"It is urged that there is developing sentiment that adults should have complete freedom to produce, deal in, possess, and consume whatever communicative materials may appeal to them and that the law's involvement with obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age. The concepts involved are said to be so elusive and the laws so inherently unenforceable without extravagant expenditures of time and effort by enforcement officers and

the courts that basic reassessment is not only wise but essential. *This may prove to be the desirable and eventual legislative course. But if it is, the task of restructuring the obscenity laws lies with those who pass, repeal, and amend statutes and ordinances. Roth and like cases pose no obstacle to such developments."*

This is consistent with the decisions of this Court since 1887 when the Supreme Court ruled in the case of *Mugler v. Kansas*, 123 U.S. 623 (1887):

"The power to determine such questions (what is offensive to public morality) so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding their own appetites or passions, may be willing to imperil the peace and security of many, provided only they are permitted to do as they please. *Under our system, that power is lodged in the legislative branch of the government. It belongs to that department to exert what are known as police powers of the state, and to determine primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety . . .*" (Emphasis Added)

Petitioners rely heavily upon the final report of the Commission on Obscenity and Pornography and its findings, conclusions and recommendations. This report was transmitted to the President of the United States and the Congress on September 30, 1970, approximately 8 months before *U.S. v. Reidel* was decided. The report was immediately rejected and denounced by the House of Representatives (*Congressional Records-House*, H 9399,

H 9676, H 10203), and categorically rejected by the Senate (*Congressional Record-Senate* S 17466; S 17903; S 18182). It was described as a "Magna Carta for the pornographer-ludicrous and a fraud upon the American public."

On Page 107 of the Petitioner's brief it is stated,

"It is further noted by the Commission on Obscenity and Pornography, law and law enforcement panel, at Page 43, 'A National survey of American public opinion sponsored by the Commission shows that a majority of American adults believed that adults should be allowed to rear or see any sexual materials they wish.'"

This is also the finding of the Commission.

A cursory examination of the Commission report itself clearly demonstrates that nothing is further than the truth.

In the section of the report entitled, The Impact of Erotica — Report of the Effects Panel to the Commission on Obscenity and Pornography, Section B, which is entitled, Public Opinion About Sexual Materials, appears the now infamous Abelson survey. The report states:

"In 1970, a survey involving face-to-face interviews with a random sample of 2,486 adults and 769 young persons (ages 15 to 20) was conducted at the Commission's request (Abelson, et al., 1970). One of the purposes of the survey was to determine whether Americans regard and define the area of erotic materials as a significant or important social problem. Adult respondents in the survey were asked: "Would you please tell me what you think are the two or three most serious problems facing the country today?"

Only 2% of the population referred to erotic materials, and many of these comments alluded to erotica through criticism of mass media or contemporary sexual standards. The most frequently mentioned problems were: war (54%), race (36%), the national economy (32%), youth rebellion (23%), breakdown of law and order (20%), drugs (20%), pollution and misuse of resources (19%), poverty and poverty programs (12%), moral breakdown (9%), and dissatisfaction with government (9%). About 4% of the population mentioned education, overpopulation, and foreign policy as serious problems, *and only 2% mentioned erotic materials.*

The report continues:

"Opinion surveys sometimes appear to report contradictory findings, and the findings of the Commission study (Abelson, et al., 1970) may appear to be inconsistent with reports that 85% of the American adults "favor stricter laws on pornography" (Gallup, 1969) and that "76% want pornographic literature outlawed and 72% believe smut is taking the beauty out of sex." (Harris, 1969)

The report did not reflect on other data from the same survey 88% would prohibit sex scenes in movies when they were put there for entertainment.

To base the findings that "a majority of American adults believe that adults should be allowed to read or see any sexual materials they wish based upon the Abelson survey is indeed ludicrous and was so branded in the Congressional Record by the Senate.

Those who insist that they have an unqualified constitutional right to disseminate pornography in this country have no regard whatsoever for its injurious effect on the people and on future generations. The welfare of the people is secondary to the pornographer's First Amendment privilege they say.

This is clearly demonstrated by Thomas I. Emerson in his recently published book, *The System of Freedom of Expression*, which is quoted at length in Petitioner's brief. On Page 100 of Petitioner's brief Mr. Emerson observed, "*Erotic reading may be injurious in its long term effects. But no one contends that expression in any other area can be suppressed on such grounds. To do so would destroy the system of freedom of expression.*" Emerson continues (Page 105, Petitioner's brief) "*In any event, as long as material is available to adults it is hopeless to try to keep it out of the hands of adolescents.*"

The Commission confesses that time limitations prevented any adequate investigation of the long term effects of pornography — this after three years of alleged study and investigation. Then why the haste to in effect repeal all laws controlling the distribution of this filth?

In *Reidel* (Page 355) this Court observed that the Trial Judge reasoned that "if a person has a right to receive and possess this material, then someone must have the right to deliver it to him." He concluded that Section 1461 could not be validly applied "where obscene material is not directed at children, or is not directed at an unwilling public, where the material such as in this case is solicited by adults . . ."

Would it not follow then that if the display of any sexually oriented films in a commercial theatre when sur-

rounded by notice to the public of their nature and by reasonable protection against exposure of the film to juveniles is held to be constitutionally protected, all federal, state and local legislation prohibiting the sale, exhibition or distribution of sexual materials to consenting adults would be effectively repealed? *This would raise a most serious and grave problem that would ultimately destroy the very moral fiber of this country.* For would it not follow that if a person has the right — *the constitutionally protected right* — to exhibit obscene film in a commercial theatre to consenting adults then someone has the right to sell the film to the exhibitor; which envisions the right of someone to transport and distribute it; which envisions the right TO MANUFACTURE THE OBSCENE FILM. This is the next step.

Perhaps the Court will consider this as "stretching" the implications of such a ruling a little bit too far. But experience graphically demonstrates that pornographers will continue to hitch-hike through the sewers of filth on every inference; on every word; and on every syllable which affords transportation to them.

Unlike the printed text whose words are created in the minds of the authors, motion picture films are actual photographs of live, real people of all ages performing every debasing act that can be conceived in the minds of man — cunnilingus, fellatio, sodomy, homosexuality, lesbian activities and bestiality, which not only includes intercourse between a human and an animal, but now embraces fellatio between human females and animals, including horses, donkeys, dogs, and even pigs.

It would indeed be a strange *First Amendment* that would permit or sanction such activities with immunity

from prosecution for the sole benefit of the very few who make their living by coining the sewage from the cesspool of pornography.

What an inheritance this would be for our children and grandchildren.

IT IS IMPORTANT to emphasize here that the two 16-millimeter films involved in this case do not portray acts of bestiality in any form whatsoever — it is the use of the words "*any sexually oriented film*" in the question presented that embraces these acts. We do however insist that the films involved here are obscene within the meaning of the *Roth-Memoirs Test*.

President Nixon promptly responded to the recommendations and report of the Commission on Obscenity and Pornography and issued the following statement on October 24, 1970:

"Several weeks ago, the National Commission on Obscenity and Pornography — appointed in a previous administration — presented its findings.

I have evaluated that report and categorically reject its morally bankrupt conclusions and major recommendations.

So long as I am in the White House, there will be no relaxation of the national effort to control and eliminate smut from our national life.

The Commission contends that the proliferation of filthy books and plays has no lasting harmful effect on a man's character. If that were true, it must also be true that great books, great paintings, and great plays have no ennobling effect on a man's conduct.

Centuries of civilization and 10 minutes of common sense tell us otherwise.

The Commission calls for the repeal of laws controlling smut for adults — while recommending continued restrictions on smut for children. In an open society, this proposal is untenable. If the level of filth rises in the adult community, the young people in our society cannot help but also be inundated by the flood.

Pornography can corrupt a society and a civilization. The people's elected representatives have the right and obligation to prevent that corruption.

The warped and brutal portrayal of sex in books, plays, magazines, and movies, if not halted and reversed, could poison the wellsprings of American and Western culture and civilization.

The pollution of our culture, the pollution of our civilization with smut and filth is as serious a situation for the American people as the pollution of our once-pure air and water.

Smut should not be simply contained at its present level; it should be outlawed in every State in the Union. And the legislatures and courts at every level of American government should act in unison to achieve that goal.

I am well aware of the importance of protecting freedom of expression. But pornography is to freedom of expression what anarchy is to liberty; as free men willingly restrain a measure of their freedom to prevent anarchy, so must we draw the line against pornography to protect freedom of expression.

The Supreme Court has long held, and recently reaffirmed, that obscenity is not within the area of protected speech or press. Those who attempt to break down the barriers against obscenity and pornography deal a severe blow to the very freedom of expression they profess to espouse.

Moreover, if an attitude of permissiveness were to be adopted regarding pornography, this would contribute to an atmosphere condoning anarchy in every field — and would increase the threat to our social order as well as to our moral principles.

Alexis de Tocqueville, observing America more than a century ago, wrote: "America is great because she is good — and if America ceases to be good, America will cease to be great."

We all hold the responsibility for keeping America a great country — by keeping America a good country.

American morality is not to be trifled with. The Commission on Pornography and Obscenity has performed a disservice, and I totally reject its report. (*Weekly Compilation of Presidential Documents*, November 2, 1970, pp. 1454 & 1455.)

CONCLUSION

The report of the Commission on Obscenity and Pornography was categorically rejected by the Congress and by the President of the United States. Eighty-five percent (85%) of the American adults favor stricter laws on pornography and seventy-six percent (76%) want pornographic literature outlawed. To use the report as a basis for opening wider the floodgate of pornography would be indeed tragic and an affront to the President, the Congress and the people of the United States.

The display of any sexually oriented films (obscene within the meaning of *Roth-Memoirs*) in a commercial theatre, when surrounded by notice to the public of their nature and by reasonable protection against exposure of the film to juveniles is NOT constitutionally protected and such should be the pronouncement of this Court in no uncertain terms.

The Supreme Court of Georgia found the films here involved to be obscene — because they are obscene. The opinion and judgment of the Supreme Court of Georgia should be flat out affirmed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

This is to certify that I have this day served Counsel for Petitioners with two (2) copies each of the within and foregoing *Respondents' Brief* by mailing the same, postage prepaid, to:

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All parties required to be served have been served.

This the 26th day of SEPTEMBER, 1972.

Original Pen Signed By.

JOEL M. FELDMAN, Esquire
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Supreme Court of the United States

October Term, 1971

No. 71-1051

PARIS ADULT THEATRE I,
Petitioner,

v.

LEWIS R. SLATON, As District Attorney,
Atlanta Judicial Circuit, and
HINSON McAULIFFE, As Solicitor General of
the Criminal Court of Fulton County, Georgia,
Respondents.

PARIS ADULT THEATRE II,
Petitioner,

v.

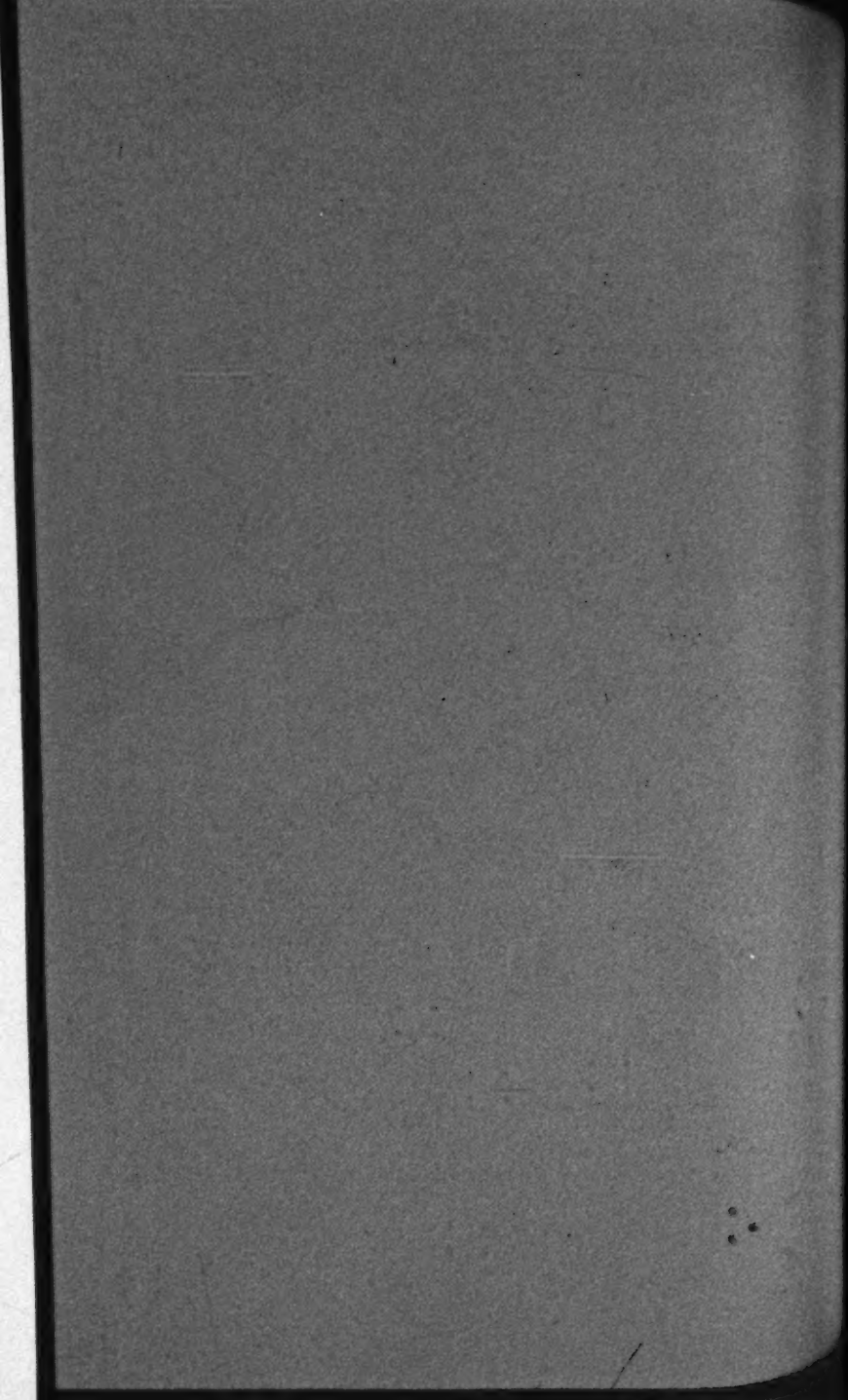
LEWIS R. SLATON, As District Attorney,
Atlanta Judicial Circuit, and
HINSON McAULIFFE, As Solicitor General of
the Criminal Court of Fulton County, Georgia,
Respondents.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA**

**MOTION OF CHARLES H. KEATING, JR., FOR LEAVE TO
FILE A BRIEF AS AMICUS CURIAE IN SUPPORT
OF RESPONDENT WITH BRIEF ANNEXED**

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1971

NO. 71-1051

PARIS ADULT THEATRE I, ET AL,
Petitioners,

v.

LEWIS R. SLATON, DISTRICT ATTORNEY,
ATLANTA JUDICIAL CIRCUIT, ET AL,
Respondents.

On Writ Of Certiorari From The
Supreme Court of Georgia

MOTION OF CHARLES H. KEATING, JR., FOR LEAVE TO
FILE A BRIEF AS AMICUS CURIAE IN SUPPORT
OF RESPONDENT WITH BRIEF ANNEXED

Charles H. Keating, Jr., (hereinafter referred to as Moving Party) respectfully moves, pursuant to Rule 42(3) of the Rules of the U. S. Supreme Court, for leave to file a brief as Amicus Curiae in support of the Respondents, Hinson McAuliffe, as Solicitor General of the Criminal Court of Fulton County, Georgia, and Lewis R. Slaton, as District Attorney, Atlanta Judicial Circuit.

Moving Party has a special interest in the subject matter of this appeal, having devoted considerable time, study and effort to assisting law enforcement in combating the spread of obscenity in the Nation: first, as the founder and co-counsel for Citizens for Decent Literature, Inc., and more recently as a member of the Presidential Commission on on Obscenity and Pornography. Moving Party is also the appellee in an obscenity case pending before this Court, entitled, "A Motion Picture Film Entitled 'Vixen', Russ Meyer, Eve Productions, Inc., Malibu, Inc., and Clarence P. Gall v. State of Ohio ex rel Charles H. Keating, Jr., October Term 1971, No. 71-599, as to which this Court on January 12, 1972, requested a response.¹ The latter appeal was carried over to the 1972 October Term without this Court having taken action thereon.

¹In Moving Party's response thereto, see Motion to Affirm at pages 13-18, this Court was urged to grant plenary review in the "Vixen" appeal for several reasons: 1. The appeal involved a civil matter and was limited to the obscenity vel non issue; and 2. the record presented ideal "facts" for review, which included (a) one of the defendants was Producer Russ Meyer, the "King" (and very first) of the pandering motion picture producers; (b) the testimony of defense witness, film historian Arthur Knight, who candidly traced the erosion which has taken place since Russ Meyer started it all, and Russ Meyer's participation therein: (See also Arthur Knight's "tout" of "School Girls" in the Los Angeles Times "Cinema Theatre" ad of Oct. 7, 1972, at Appendix F, page 3) and (c) the testimony of plaintiff's witness, Mr. Melvin Anchell, a practicing psychiatrist and author of "Sex and Sanity," who very logically explained the psychiatric basis for the prescription of obscenity (and this Court's holding in Roth-Alberts, 354 U.S. 476, 485, that it was the universal judgment of civilized nations that obscenity should be restrained). The members of this Court, having viewed "Magic Mirror," produced several years after "Vixen" should make a comparison of the same with "Vixen" (photography, content, musical sound track, etc.) and ask themselves if justice does not require that a case, dealing directly with the producer, be handed down for the enlightenment of and as a warning for those in the trade. See Appendix F, pp 8-11 for Santa Monica article on James R. Haskin, Executive Producer of "Magic Mirror".

The grant of a writ of certiorari herein brings before this Court for oral argument, the first obscenity case dealing with a motion picture film since the grant of a writ of certiorari ten years ago in *Ohio v. Jacobellis*.² In *Jacobellis*, this Court reviewed the felony conviction of Nico Jacobellis, manager of the Heights Art Theater in Cleveland Heights, Ohio, for exhibiting the French imported film "Les Amants" (The Lovers) and examined the interdependent "obscenity" and "scienter" issues, which in the following years have continued to plague this Court.³ Here in the *Paris Adult*

²Jurisdiction was first noted at the commencement of the 1962 October Term. *Jacobellis v. Ohio*, 371 U.S. 808, 9 L.Ed.2d 52, 83 S. Ct. 28 (Oct. 8, 1962). After argument without decision during that term, the case was restored to the docket. *Jacobellis v. Ohio*, 373 U.S. 901, 10 L.Ed.2d 197, 83 S. Ct. 1288 (Apr. 29, 1963). Re-argument did not occur until late in the 1963 October Term (Apr. 1, 1964) with this Court's no-clear majority decision being handed down on the last day of that term. *Jacobellis v. Ohio*, 378 U.S. 184, 12 L.Ed.2d 793, 84 S. Ct. 1672 (June 22, 1964).

The *Jacobellis* decision presents only the law of the case and is not a constitutional precedent which binds this Court. In that decision, Justices Warren, Clark and Harlan dissented and Justices Black and Douglas refused to sit in judgment on the merits and apply the law of the land in *Roth v. U.S.*, 354 U.S. 476, 77 S. Ct. 1314, 1 L.Ed.2d 1498 (June 24, 1957), which holds obscenity legislation constitutional. Of the four remaining Justices, Justice White's vote without opinion can, with reason, be attributed to the criminal aspects of the case and the unfortunate fact that Jacobellis, as an alien and convicted felon, would be subject to a denial of citizenship. Compare Justice White's dissenting vote on the same day in the civil case, *Grove Press, Inc. v. Gerstein* (Tropic of Cancer), 378 U.S. 577, 12 L.Ed.2d 1035, 84 S. Ct. 1909 (June 23, 1964). Justice Stewart erroneously applied a "hard-core pornography" reasoning which this Court, in reviewing a state obscenity conviction in *Mishkin v. New York*, 383 U.S. 502, 508, 16 L.Ed.2d 56, 61, 86 S. Ct. 958 (Mar. 21, 1966), held not to be the law.

³See, for example, the compromising result reached in the *Redrup* and *Austin* cases, cert. granted, limited to the "scienter" issue in *Redrup v. New York*, 384 U.S. 916, 16 L.Ed.2d 438, 86 S. Ct. 1362 (Apr. 25, 1968), and *Austin v. Kentucky*, 384 U.S. 916, 16 L.Ed.2d 438, 86 S. Ct. 1362 (Apr. 25, 1966), but decided on

Theater case the issues are not so complex - only "obscenity vel non" is being litigated, and that in relation to the fundamental power of a sovereign state, functioning in a civilized society, to proscribe the same as a matter of law, so as to preserve good public morality.

Moving Party submits that the real import of the appeal herein will be apparent only to those members of this Court who are willing to recall to mind from memory the vastly superior state of public morality (sexual) which existed when *Jacobellis* was decided just one short decade ago. Succinctly put, when one dwells for too long a period in a dung heap, the reminiscent smell of fresh air has an elusive manner of escaping the memory.⁴ Without invoking that

other grounds in a no-clear majority decision in *Redrup v. New York*, 386 U.S. 767, 18 L.Ed.2d 515, 87 S. Ct. 1414 (May 8, 1967).

The *Redrup* decision presents only the law of the case, and is not a constitutional precedent which binds this Court. In that decision, Justices Harlan and Clark dissented. Of the seven remaining Justices, Justices Black and Douglas refused to sit in judgment on the merits and apply the law of the land in *Rotb*, 354 U.S. 476, 1 L.Ed.2d 1949, 77 S. Ct. 1314 (June 24, 1957), which holds obscenity legislation constitutional. Of the five remaining Justices, Justice Stewart erroneously applied a "hard-core" pornography reasoning which this Court, in reviewing a state obscenity conviction in *Mishkin v. New York*, 383 U.S. 502, 508, 16 L.Ed.2d 56, 61, 86 S. Ct. 958 (Mar. 21, 1966), held not to be the law in state cases.

⁴See the observations of Federal District Judge Peirson Hall, speaking on "The Monster Vice" in *U. S. v. Four (4) Books*, 289 F.Supp. 972 at 973 (Sept. 10, 1968):

"Vice is a monster of so vile a mien,
As, to be hated, needs but to be seen;
Yet seen too oft, familiar with her face,
We first endure, then pity, then embrace."

"The verity of the above quotation is brought home not only by the continually increasing number of periodicals, paperbacks and other printed material glorifying things which most people regard as indecent or obscene, which flood news stands and book-racks, but also, to anyone who has read them, by the recent journeys of the Supreme Court of the United States on the question of 'obscenity'"

⁵From Alexander Pope's "Essay on Man."

reference, the significance of this appeal will dwindle into nothingness. and the result reached herein will become just another oscenity decision of this Court.

In Moving Party's view, this Nation is facing a moral crisis of this Court's making. It is not hyperbole to urge this Court that the result reached herein or, more properly, the rationale employed in arriving at that result, will either provide the foundation upon which our moral structures may be rebuilt, or will further excavate the grave of depravity into which this Nation is sure to tumble. The present fate of this Nation is in the hands of the individual members of this Court.⁸

⁸ In the introduction of his book, "Jews, God and History," Max I. Dimont discusses the eight basic ways of viewing history, the last two of which he expresses as follows at page 20:

"The 'cult of personality' is the seventh face of history. Proponents of this school hold that events are motivated by the dynamic force of great men. If not for Washington, they say, there would have been no American Revolution; if not for Robespierre, there would have been no French Revolution; if not for Lenin, there would have been no Russian Revolution. Men create the events, claim these historians, in contrast to the economic interpreters who insist on the exact opposite, that events create the men.

"The eighth face of history, the religious, is both the oldest and newest concept. The Bible is the best example of this type of historical writing in the past. This way of viewing history looks upon events as a struggle between good and evil, between morality and immorality. Most Jewish history, until recent times, has been written from this viewpoint . . .

" . . . Martin Buber holds that the central theme running through their history is the relation between the Jew and his God, Jehovah. In the Jewish religious view of history, God has given man freedom of action. Man, as conceived by the Jewish existentialists, has the power to turn to God or away from God. He can act either for God or against God. What happens between God and man is history. In the Jewish way way of looking at things, success in an undertaking, for instance, is not viewed as blessed by God. A man may arrive at power because he was unscrupulous, not because God aided him. This leaves God free to hold man accountable for his actions - both successes and failures."

Governmental attorneys, in defending attacks on public morality, are prone to take the short view and limit their reply to a case by case response. This, Moving Party submits, places the people's cause at a disadvantage. Moving Party, therefore, respectfully requests that he be granted leave to file a brief *amicus curiae*, setting forth arguments on the broader view for such assistance as they may provide to the individual members of this Court.

Dated: October 11, 1972.

CHARLES H. KEATING, Jr.
Amicus Curiae

This Nation, with its roots inextricably woven in our Judeo-Christian background, is at a crossroads, and in danger of tobogganning toward destruction in the face of the warning words of Presiding Justice Turney Fox in *California v. Williamson*, 207 Cal. App. 2d, 838, 24 Cal. Rptr. 734 (Sept. 26, 1962) (Paperback book, *Fear of Incest*), cert. den. in *Williamson v. California*, 377 U.S. 994, 12 L.Ed.2d 1047, 84 S. Ct. 1902 (June 22, 1964) rehearing denied in 379 U.S. 871, 13 L.Ed.2d 77, 85 S. Ct. 13 (Oct. 12, 1964) that "other civilizations have in the past which have overindulged their appetites and cast aside decent standards of behavior." Moving Party submits that the judgment of the individual members of this Court will have its dynamic force in one direction or the other and that, in truth, men do create the events.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-1051

PARIS ADULT THEATRE I, ET AL,
Petitioners,

v.

LEWIS R. SLATON, DISTRICT ATTORNEY,
ATLANTA JUDICIAL CIRCUIT, ET AL,
Respondents.

On Writ Of Certiorari From The
Supreme Court of Georgia

Brief Amicus Curiae of Charles H. Keating, Jr., in Support
of Respondent.

STATEMENT OF THE CASE

A. BACKGROUND

On December 28, 1970, Respondents Hinson McAuliffe, as the Solicitor General of the Criminal Court of Fulton County, and Lewis R. Slaton, as the District Attorney of the Atlanta Judicial Circuit, joined as plaintiffs in filing two complaints in the Fulton County Superior Court in Atlanta,

Georgia, seeking equitable relief on public nuisance grounds² against the Paris Adult Theatre I and Paris Adult Theatre II and its operators, alleging that on December 28, 1970, the defendants exhibited to the general public for an admission charge the 16 millimeter motion picture film entitled, "It All Comes Out In The End" at the Paris Adult Theatre I (A 19-25) and the 16 millimeter motion picture film "Magic Mirror" at the Paris Adult Theatre II (A 38-43), in violation of the State obscenity statute, Georgia Code Section 26-2101. The complaints further charged that the sole and dominant theme of the films considered as a whole, applying contemporary standards, appealed to a prurient interest in sex, nudity and

²The Georgia Supreme Court gave its approval to the "nuisance" approach to "obscenity" in *Evans Theatre Corp. v. Slaton* (I Am Curious (Yellow)), 180 S.E.2d 712, 716, Mar. 4, 1971, petition for certiorari denied in *Evans Theatre Corp. v. Slaton*, U.S. , 30 L.Ed.2d 267, S. Ct. (Nov. 9, 1971), as follows:

"We recognize the principle that equity will take no part in the administration of the criminal law. Code § 55-102. However, it has long been the rule in this State that the State has an interest in the welfare, peace, and good order of its citizens and communities, and that an action may be maintained at the instance of the prosecuting attorney to enjoin an existing or threatened public nuisance, even though the nuisance constitutes a crime punishable under the criminal laws. See: *Lofton v. Collins*, 117 Ga. 434(3), 43 S.E. 708, 61 L.R.A. 150; *Walker v. McNelly*, 121 Ga. 114(1), 115, 48 S.E. 718; *Edison v. Ramsey*, 146 Ga. 767, 92 S.E. 513, *Dean v. State*, 151 Ga. 371(1), 106 S.E. 792, 40 A.L.R. 1132; *Gullatt v. Collins*, 169 Ga. 538, 150 S.E. 825; *Rose Theatre Inc. v. Lilly*, 185 Ga. 53(1), 193 S.E. 866; *Atkinson v. Lam Amusement Co.*, 185 Ga. 379, 195 S.E. 156; *Forehand v. Moody*, 200 Ga. 166, 36 S.E.2d 321; *Norris v. Willingham*, 204 Ga. 441, 50 S.E.2d 22; *Thornton v. Forehand*, 211 Ga. 658, 87 S.E.2d 865; *Lee v. Hayes*, 215 Ga. 330, 331, 110 S.E.2d 624.

"The exhibition of an obscene motion picture is a crime involving the welfare of the public at large, since it is contrary to the standards of decency and propriety of the community as a whole. The welfare of the whole community is served by restraining the showing of such an obscene film.

"The court of equity was authorized to enjoin the exhibition of this obscene motion picture to the public." (Our emphasis)

excretion, that the same was utterly and absolutely without any redeeming social value whatsoever, and transgressed beyond the customary limits of candor in describing and discussing sexual matters (A 19, A 38).

Both complaints requested that a Rule Nisi issue, requiring the defendants to show cause why such motion picture films should not be declared obscene. On that date, an ex parte order issued out of that Court temporarily restraining and enjoining the defendants "from concealing, destroying, altering or removing the . . . (films) . . . without the jurisdiction of this Court." and ordering the defendants to appear on January 13, 1971, at 2:00 P.M. with the films as they were exhibited to the general public on the 28th day of December, 1970, together with the proper equipment for exhibiting and viewing the same (A 22, 41) and show cause why such orders should not issue.

The films were produced in Court by the defendants on January 13, 1971, after Joe Bellew, the manager of both theatres had been held in contempt for refusing to furnish the same on grounds of self-incrimination⁷ (A 48). At that

⁷In addressing itself to this problem, the Arizona Supreme Court in *Anderson v. Coulter*, 499 P.2d 103 (June 29, 1972) recently held as follows:

"We believe that reliance upon the Fifth Amendment to prevent the production of a film that has been previously exhibited to the public is misplaced. *Having the protection of the First Amendment and asserting it as the defendant does here, it seems to us both illogical and irrational to say, particularly where the item has been exhibited to the public, that the defendant may then rely upon the privilege against self-incrimination to refuse to produce the film at the prior adversary hearing.*

"We agree with Justice Traynor concerning the extent of the testimonial privilege: '* * * When the prosecution has ample evidence of the existence, identity, and authenticity of documents in the defendant's possession and thus does not need to rely on his knowledge to locate and to identify them or on his testimony to authenticate them, it may be that his implied admission alone that the documents produced were those he

time, the parties stipulated and agreed to waive a jury trial and a preliminary hearing, in order that the judgment and order entered by the trial judge would be a final order and judgment in each case (A 89). It was also stipulated that three photographs (copies, Appendix F, p. 4) could be received in evidence as correctly portraying the outside of the Paris Adult Theatre I and Paris Adult Theatre II as they existed on December 28, 1970.

B. THE TRIAL

The two films, "It All Comes Out In The End" and "Magic Mirror" were exhibited to the Court (A 50). Time-Motion Studies of the subject matter appearing in those films appear hereinafter at pages 11 to 63, for this Court's examination.²

was ordered to produce would involve too trivial a degree of incrimination to justify invoking the privilege. (See Maguire, Evidence of Guilt, pp.22-23; Meltzer, Required Records, The McCarran Act, and the Privilege Against Self-Incrimination, 18 U.Chi.L.Rev. 687, 699-701.) * * * Jones v. Superior Court of Nevada County, 58 Cal.2d 56, 22 Cal. Rptr. 879, 372 P.2d 919, 921, 96 A.L.R.2d 1213 (1952).

"In this case, the prosecution's 'ample evidence' of the 'existence, identity, and authenticity' of the movie was expressly shown in the subpoena duces tecum. It is obvious that the prosecution had everything it needed to identify the film and compliance with the subpoena duces tecum did no more than produce the film already known by both the prosecution and the court to exist.

"We believe that a person who exhibits to the public an allegedly obscene film has, by that showing, waived his right to claim his privilege against self-incrimination when subpoenaed to produce the film at the prior adversary hearing, provided the prosecution has properly identified the film to be produced." (Our emphasis)

²A time-motion study is a chronological series of still photographs of a motion picture film, timed in their relative order of appearance, which, by "stopping" the movement appearing on the motion picture screen and recording the same, permits the type of conduct being portrayed thereon to be analyzed in a fair and accurate manner. Compare in this regard, the photographic representations of "It All Comes Out In The End" and "Magic Mirror" with the verbal descriptions of the same in Judge Jack Etheridge's opinion, appearing at page 74.

TIME-MOTION STUDY OF

"MAGIC MIRROR

Exhibited at
Paris Adult Theatre,
Atlanta, Georgia

Dec. 28, 1970

"MAGIC MIRROR"

(Part 1 of 15 Parts)





"MAGIC MIRROR"

(Part 1 of 15 Parts)

Credits 1-2; Female 1 browsing in antique store, purchases mirror 3-34; female 1 in her Apt. 35-38; TV man arrives to do repair 39-55; female 1 enters her bedroom for mirror and glance at mirror 56-58; fade to scene. female 1 & TV man.

"MAGIC MIRROR"

(part 2 of 15 parts)



"MAGIC MIRROR"
(Part 2 of 15 Parts)

Female 1 & TV man lather each other, genitals and breasts 73-111; they fall to floor and engage in sexual intercourse, female on top 113-136; female slides back and forth over his body 137-144

"MAGIC MIRROR"

(Part 3 of 15 Parts)



"MAGIC MIRROR"

(Part 3 of 15 Parts)

Female continues to slide over male 144-170; sexual intercourse, woman on top
172-194; sexual intercourse, male on top 196-216

"MAGIC MIRROR"

(Part 4 of 15 parts)



"MAGIC MIRROR"
(Part 4 of 15 Parts)

Sexual intercourse, male on top 217-254; they grapple and roll over each other 254-276; sexual intercourse, woman on top 277-288.

(Part 5 of 15 Parts)



"MAGIC MIRROR"
(Part 5 of 15 Parts)

Sexual intercourse, woman on top 289-293; sexual intercourse, man on top 295-301; simultaneous fellatio and cunnilingus 301-319; fadeout to 322; female 1 pays TV man 322-329; female reading as doorbell rings, female 2 and female 30

"MAGIC MIRROR"

(Part 6 of 15 Parts)



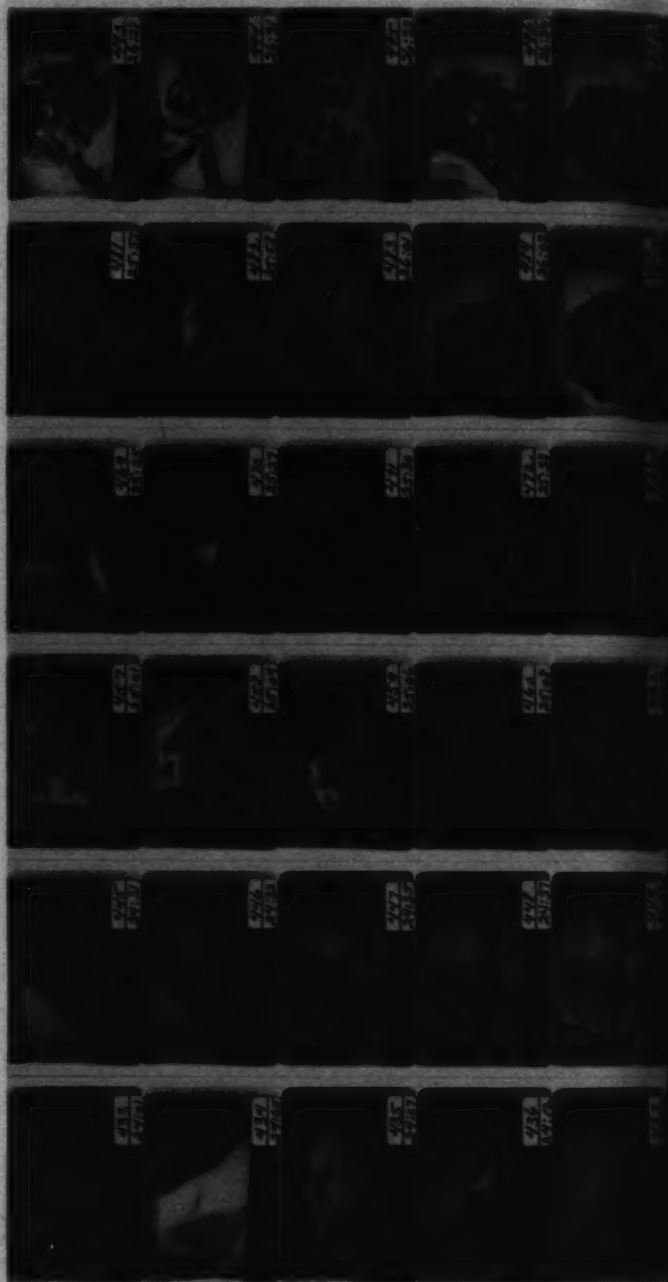


"MAGIC MIRROR"
(Part 6 of 15 Parts)

Fade to both girls nude 360-364; lesbian activity 364-382; female on top, rubbing genitals 383-399; lesbian activity 400-408; cunnilingus 409-415; females fondle each other's breasts 416-432.

"MAGIC MIRROR"

(Part 7 of 15 parts)



"MAGIC MIRROR"
(Part 7 of 15 Parts)

Focus on anus 433-440; cunnilingus 441-453; simultaneous cunnilingus 454-493;
reverse positions in cunnilingus 494-504.

(Part 8 of 15 Parts)





"MAGIC MIRROR"
(Part 8 of 15 Parts)

Cunnilingus 505-512; rubbing of genitals 512-527; cunnilingus and auto-eroticism 527-558; lesbian activity 558-576.

"MAGIC MIRROR"

(Part 9 of 15 Parts)





"MAGIC MIRROR"
(Part 9 of 15 Parts)

Lesbian activity 577-583; rubbing of genitals 584-636; fadeout as girls leave 641; scene shifts to bedroom, female, and man in full dress are dancing 641-648.

"MAGIC MIRROR"

(Part 10 of 15 Parts)



"MAGIC MIRROR"

(Part 10 of 15 parts)

Female 1 and man dance 649-659; both look at mirror - fadeout to two nude males and two nude females dancing 661-678; cunnilingus 678; fellatio 680-682; sexual embrace 682-690; cunnilingus 691-701; sexual intercourse, woman or top, 702-707; sexual activity 708-720.

"MAGIC MIRROR"

(Part 11 of 15 parts)





"MAGIC MIRROR"

(Part 11 of 15 Parts)

Cunnilingus 723; sexual intercourse 724-731; cunnilingus 733; sexual intercourse male on top 737-750; sexual intercourse, woman on top 751-756; group orgy 756-792

"MAGIC MIRROR"

(Part 12 of 15 Parts)



"MAGIC MIRROR"

(Part 12 of 15 Parts)

Sexual intercourse, male on top 793; 824-833; sexual intercourse, woman on top 834; group orgy 834-856; fade to apartment 856-858; couple leave in formal attire 858-861; scene shifts to female 1 asleep in bed 862-864.

"MAGIC MIRROR"

(Part 13 of 15 Parts)





"MAGIC MIRROR"

(Part 13 of 15 Parts)

Burglar enters and rifles her purse 865-869; female awakes and burglar using gun forces her to lie down as he binds her hands 872-880; policeman enters and holds gun on burglar 881-892; fade to robber and policeman nude, fondling female 1

"MAGIC MIRROR"

(Part 14 of 15 Parts)





"MAGIC MIRROR"

(Part 14 of 15 Parts)

Sexual intercourse between female 1 and burglar 932-940; female on top 940-943; cunnilingus 944; sexual intercourse, woman on bottom 948-956; sexual intercourse woman on top 958-965; sexual intercourse, lying on top of unconscious policeman 980-984; officer awakens 984-987; group orgy 987-1008.

"MAGIC MIRROR"

(part 15 of 15 parts)





"MAGIC MIRROR"

(Part 15 of 15 Parts)

Group sexual intercourse 1009-1032; sexual intercourse, woman on top 1049; female performs fellatio on each; policeman licks her toes 1064; scene changes back to room; police officer shoots burglar who falls to floor 1064; policeman leaves to make report; female reads note.

RECEIVED
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TIME-MOTION STUDY OF

"IT ALL COMES OUT IN THE END"

Exhibited at
Paris Adult Theatre,
Atlanta, Georgia

Dec. 28, 1970

(Part 1 of 10 parts)





"IT ALL COMES OUT IN THE END"
(Part 1 of 10 Parts)

Credits 1-15; Females 1 and 2 in lesbian activity 16-21; males 1 and 2 riding in auto 22; lesbian activity 23-26; males in auto 27-31; lesbian activity 32-35; males in auto 36-38; cunnilingus 39-49; double cunnilingus 50-66; males in auto 67-69; lesbian activity 70-71; males in auto 72-73; lesbian activity 74-75; males in auto 76-77; lesbian activity 78-79; males in auto 80-81; lesbian activity 82-83; males in auto 84-85; lesbian activity 86-87; males in auto 88-89; lesbian activity 90-91; males in auto 92-93; lesbian activity 94-95; males in auto 96-97; lesbian activity 98-99; males in auto 100-101; lesbian activity 102-103; males in auto 104-105; lesbian activity 106-107; males in auto 108-109; lesbian activity 110-111; males in auto 112-113; lesbian activity 114-115; males in auto 116-117; lesbian activity 118-119; males in auto 120-121; lesbian activity 122-123; males in auto 124-125; lesbian activity 126-127; males in auto 128-129; lesbian activity 130-131; males in auto 132-133; lesbian activity 134-135; males in auto 136-137; lesbian activity 138-139; males in auto 140-141; lesbian activity 142-143; males in auto 144-145; lesbian activity 146-147; males in auto 148-149; lesbian activity 150-151; males in auto 152-153; lesbian activity 154-155; males in auto 156-157; lesbian activity 158-159; males in auto 160-161; lesbian activity 162-163; males in auto 164-165; lesbian activity 166-167; males in auto 168-169; lesbian activity 170-171; males in auto 172-173; lesbian activity 174-175; males in auto 176-177; lesbian activity 178-179; males in auto 180-181; lesbian activity 182-183; males in auto 184-185; lesbian activity 186-187; males in auto 188-189; lesbian activity 190-191; males in auto 192-193; lesbian activity 194-195; males in auto 196-197; lesbian activity 198-199; males in auto 200-201; lesbian activity 202-203; males in auto 204-205; lesbian activity 206-207; males in auto 208-209; lesbian activity 210-211; males in auto 212-213; lesbian activity 214-215; males in auto 216-217; lesbian activity 218-219; males in auto 220-221; lesbian activity 222-223; males in auto 224-225; lesbian activity 226-227; males in auto 228-229; lesbian activity 230-231; males in auto 232-233; lesbian activity 234-235; males in auto 236-237; lesbian activity 238-239; males in auto 240-241; lesbian activity 242-243; males in auto 244-245; lesbian activity 246-247; males in auto 248-249; lesbian activity 250-251; males in auto 252-253; lesbian activity 254-255; males in auto 256-257; lesbian activity 258-259; males in auto 260-261; lesbian activity 262-263; males in auto 264-265; lesbian activity 266-267; males in auto 268-269; lesbian activity 270-271; males in auto 272-273; lesbian activity 274-275; males in auto 276-277; lesbian activity 278-279; males in auto 280-281; lesbian activity 282-283; males in auto 284-285; lesbian activity 286-287; males in auto 288-289; lesbian activity 290-291; males in auto 292-293; lesbian activity 294-295; males in auto 296-297; 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"IT ALL COMES OUT IN THE END"

(Part 3 of 10 parts)



"IT ALL COMES OUT IN THE END"
(Part 3 of 10 Parts)

Females 1 and 2 at dock area 145-157; two males arrive and go in opposite direction 158-176; female 1 invites male 1 to her apartment for coffee 177-193; female 2 (blonde) arrives with male 2 (companion of male 1) 194-209; female 2 in kitchen talks to male 2. They embrace 210-216.

"IT ALL COMES OUT IN THE END"

(Part 4 of 10 Parts)



"IT ALL COMES OUT IN THE END"
(Part 4 of 10 Parts)

Female 2 and male 2 embrace in kitchen 217-219; male 1 talks to female 1 and are joined by other couple 220-224; male 2 and female 1 (brunette) go into bedroom; male 2 forcibly undresses and engages female 1 in intercourse and cunnilingus 228-261; female 2 in living room does strip tease for male 1 262-275; in bedroom, male 2 and female 1 engage in cunnilingus and fellatio 276-288.

"IT ALL COMES OUT IN THE END"

(Part 5 of 10 Parts)

"IT ALL COMES OUT IN THE END"
(Part 5 of 10 Parts)

Female 2 undresses male 1 in living room 290-296; female 1 and male 2 in sexual intercourse in bedroom 297-302; female 2 mounts male 1 in living room 303-314; sexual intercourse in bedroom, male on top 315-331; female 2 undresses male in living room and starts fellatio 332-340; sexual intercourse in bedroom, male on top 341-360.

"IT ALL COMES OUT IN THE END"

(Part 6 of 10 Parts)





"IT ALL COMES OUT IN THE END"
(Part 6 of 10 Parts)

Female 2 performs fellatio on male 1 in living room, who has climax. 361-432.

(Part 7 of 10 parts)



"IT ALL COMES OUT IN THE END"
(Part 7 of 10 Parts)

Sexual intercourse in bedroom, male on top 433-453; in bedroom, male 2 forces female to perform fellatio 454-483; sexual intercourse in bedroom, male on top 484-504. Sexual climax.

"IT ALL COMES OUT IN THE END"

(Part 8 of 10 Parts)





"IT ALL COMES OUT IN THE END"
(Part 8 of 10 Parts)

Sexual intercourse in bedroom, male 2 on top 505-523; male 2 exist bedroom and female 2 enters bedroom 524-531; males 1 and 2 reach homosexual understanding in living room 532-550; females 1 and 2 engage in lesbian acts in bedroom 551-559; males 1 and 2 enter bedroom 560-565; males 1 and 2 engage females 1 and 2 in sex orgy 566-576.

"IT ALL COMES OUT IN THE END"

(Part 10 of 10 Parts)



"IT ALL COMES OUT IN THE END"
(Part 10 of 10 Parts)

Sexual intercourse, male on top 649-667.

THE END

The two investigators from the Solicitor's office identified the same as being the films which they had seen exhibited at the Paris Adult Theatre I and Paris Adult Theatre II on December 28, 1970. The defense offered a witness, Robert Morris Dowd, Assistant Professor of Maternal and Child Health and Family Health and Population Dynamics at the School of Public Health and Tropical Medicine at Tulane University, who testified that the predominant appeal of the film was not to a prurient interest in sex and that the films were of value to society.

1. Plaintiff's Case in Chief

On direct examination by Mr. Moran, Ira W. Brown, an investigator in the Solicitor's office testified as to the circumstances surrounding his viewing of the film. He stated that on December 28, 1970, he had occasion to view the film, "All Comes Out In The End" in its entirety at the Paris Adult Theatre, 320 Peachtree Street, Fulton County, Georgia where he gained admission by paying an admittance fee of \$3.00; that he had seen the film which had been exhibited to the Court and that, to the best of his knowledge,⁹ the film

⁹The disadvantage flowing from Ira Brown's failure to take possession of the instrumentality of the crime on December 28, 1970, is apparent. With a lapse of two weeks between the two viewings, the "faulty judgment resulting from disability in one or more of the senses, *Breithaupt v. Abram*, 352 U.S. 432, 439, 16 L.Ed.2d 448, 453, 77 S. Ct. 409 (Feb. 25, 1957), had time to take hold and the most reliable testimonial evidence that he could give was that "to the best of my knowledge" the films were the same. It is a well-documented fact that sexually oriented motion picture films are often altered by deleting erotic scenes. The effective administration of justice requires that an exact copy of the contents of the film, as shown at the time of the alleged offense, be preserved for trial. See Amicus Curiae Brief of Charles H. Keating, Jr. in Support of Respondent in *Roaden v. Commonwealth of Kentucky*, No. 71-1134, Point I B 1, at pages 69-85, "Legitimate Interests of Society Require That The Autoptical Evidence Used To Project The Audio Sound And Visual Images On The Screen Be Preserved Against Alteration or Destruction."

had seen exhibited in the courtroom was the same film he had seen at the Paris Art Theatre on December 28, 1950, (A 50-51).

In cross-examination by defense counsel Smith, Brown testified that there were no advertising pictures on the outside of the theatre to draw his attention to the contents of either of the two films. (A 51)

In questioning by the Court he answered that he believed there was a sign outside advising of the title of the film, "It Comes Out In The End" and that he knew the title of the film as he went in, but that he believed the question asked was as to any pictures, and he was assuming the question was as to pictures of what was showing inside (A 52).

In re-examination by Mr. Moran, he testified that he did not remember if the title of the picture was exhibited outside the door, or the marquee of the building; that there were many people in the theatre when he was there; that there was nothing exhibited on the outside of the theatre which would indicate acts of fellatio, or acts of cunnilingus, or acts of intercourse in multiple groups would be shown.

In re-cross-examination by defense counsel Smith, Brown testified that he had seen movies in the City of Atlanta where there was depiction of cunnilingual activity and fellatio were clearly depicted. Asked, "Were there any such depiction clearly depicted in this movie?" he answered, "Not clearly." Asked if he in fact, saw any film that showed an act of intercourse, he answered, "The film I would say spoke for itself. If you say penetration, no." (A 53)

In re-direct examination by Mr. Moran, he stated that he had seen in the film a nude male between the legs of a female, with motions, and saw the head and face of a female with her head in the pubic region of a nude

male.

On re-examination by the Court he was asked, "You answered Mr. Moran's questions but I want to be sure your having seen that. Would you state or could you state whether those acts were simulated acts or actual acts of cunnilingual activity and fellatio,"¹⁰ to which Brown replied, "If you were in the room, you would see as much you see on the film if you were standing in the room." (A 54)

On re-cross-examination by defense counsel Smith, Brown re-stated that he had seen films in Atlanta in which the acts were clearly depicted, including penetration, and while the Paris Adult Theatre film, did not show penetration, there was no difference between the movies. Asked the question "So when you answered the Judge's question, it was your imagination that you were utilizing as to what was being depicted on the screen, isn't that true?" he answered, "I wouldn't say that was my imagination." and that he saw cunnilingual activity and fellatio, or what he thought of those things (A 55).

C. R. Little, an investigator in the Solicitor's office testified on direct examination as to the circumstances surrounding his viewing of the film. He stated that on December 28, 1970, he had occasion to see the film, "Magic Mirror" in its entirety at the Paris Art Theatre at 320 Peach Street, Fulton County, Georgia, where he gained admission.

¹⁰When Superior Court Judge Jack Etheridge asked this question of the witness, he himself has already seen both films in their entirety. (A 50) In view of the nature of the context of the film, "It All Comes Out In The End," (see time-motion studies pages 10 to 12, supra) it is difficult for amicus to understand the significance of such a line of questioning. Perhaps Judge Etheridge was misled by the 8 millimeter film which defense counsel proffered to the Court as "illustrations and not as evidence" of films which were held not to be obscene. (A 54)

by purchasing a ticket for \$3.00; that he had seen the film which had been exhibited in the courtroom and that it was the same movie he had witnessed on December 28, 1970. (A 56) He stated he purchased the ticket from Cliff Terry, the clerk on duty, who told him that Fred Pritchard was the projectionist on duty. He stated that he knew Joe Bellew to be the manager of the theatre, but that Bellew was not there when he purchased the ticket; he stated that there was nothing on the outside of the theatre to warn a person what the contents of the film would be, other than that adult movies were being shown inside and that no one under 21 years of age would be admitted. (A 57)

The Court sustained the defense counsel's objection to the question regarding his opinion as to whether or not the film, "Magic Mirror" had any redeeming social value on the grounds that he had not been qualified as an expert. (A 58)

On cross-examination by defense counsel Smith, he was asked if there was a theatre in town which had signs outside that said acts of fellatio and intercourse were depicted inside to which he replied, "Yes, Flick 16 on Houston Street in Atlanta." (A 59) He stated that he saw acts of intercourse, fellatio and cunnilingus in the "Magic Mirror"; that he didn't see actual penetration of the penis, but had in other films; that he didn't actually see the woman putting her mouth on the man's penis; that he saw a man put his tongue in the area of the vagina, and that in one scene there was actual touching of the vagina of two women, and the feeling and fondling of the breasts, and the body of one another, movement, and heavy breathing; that coupled with the motions, the sound effects, and breathing, and so forth, there was no question but what acts of fellatio, cunnilingus and intercourse were being performed. (A 60)

He stated that he had at one time on another occasion seen an Indian shot from his horse in a movie and didn't think he got shot by the arrow. Asked, "That was simulated death, wasn't it?", he replied, "I suppose it was, yes sir." Asked if the Indian grunted and groaned and acted like he was dying, he answered, "Well, they go through the motions, yes sir." (A 62)

On re-direct examination by Mr. Moran, he stated that there was no doubt in his mind when he saw a naked man with his head between the legs of a naked woman and his face in her pubic area that an act of cunnilingus was being performed, and that if he should walk into a room and see a nude woman with her legs spread apart and a nude man on

"A clear example of the application of a non sequitur. There is no law which prohibits the pictorial portrayal of simulated murder, whereas there is an almost universally recognized law which prohibits the pictorial portrayal of indecent public conduct and that is the law against "lewdness" in public displays. By far the best legal opinion on this point of law was written by Judge Burke, speaking for the majority of the New York Court of Appeals in *Trans-Lux Dist. Corp. v. Bd. of Regents*, 248 N.Y.S.2d 857, 861, (Mar. 26, 1964) reversed on other grounds in *Trans-Lux Dist. Corp. v. Bd of Regents* 380 U.S. 259, 13 L.Ed.2, 959, 85 S. Ct. 952.

"This comparison between the acknowledged competence of the State to forbid public or semi-public sex displays and its power to exert similar control over similar conduct depicted on the screen is not intended to imply any broad theory of legal equivalence between real conduct and filmed imitation. Indeed, the meaningful comparison exists only in a narrow range of cases. In most instances, the real conduct is illegal because of what is accomplished by the person, as in murder, forgery, or adultery. In such cases, the filmed dramatization obviously does not share the evil aimed at in the law applicable to the real thing. Where, however, the real conduct is illegal, not because of what is accomplished by those involved, but simply because what is done is shocking, offensive to see, and generally believed destructive of the general level of morality, then a filmed simulation fully shares, it seems to me, the evil of the original. In such cases the free expression protection of the First Amendment must apply to both or neither. It makes no sense at all to say that the conduct can be forbidden but not the play or film.

top of her going up and down and making upward and downward movements with her head and him making remarks for her to take it all, that was an act of fellatio. (A 63)

2. The Defense

Robert Morris Dowd was offered by the defense as a witness to testify on "prurient appeal" and "social value." (A 69) He stated that his present address was 6061 Parish Avenue, New Orleans, Louisiana, and that he was presently Assistant Professor of Maternity and Child Health and Family Health and Population Dynamics at the school of Public Health and Tropical Medicine at Tulane University; (A 65) that he was Vice-President of the Louisiana Mental Health Planning Council, a member of the Louisiana Mental Health Association, a member of the Louisiana Psychiatric Association and until recently, a member of the Juvenile Delinquency Committee of the Louisiana State Crime Commission on Law Enforcement and Administration of Criminal Justice; that during the past three years he had served as Director of Family Life and Sex Education of Orleans Parish in the public school system and also served as an adjunct to the Assistant Professor of Maternity and Child Health and a clinical Assistant Professor of Psychiatry and Neurology. (A 66)

He stated that he had a Bachelor of Arts degree in Philosophy from the University of Buffalo, a Master of Education degree from the University of Buffalo, and a Master of Arts degree from the same university; that he had a doctorate in education degree from the State University of New York at

Buffalo and a Master of Public Health degree in family health and population dynamics from Tulane University, School of Public Health and Tropical Medicine. (A 67)

Dowd stated that until July 1st he was a full-time member of Mr. Robert East's group practicing in Tulane University in the Department of Psychiatry and as a member of that group did mainly marital therapy and taught human sexuality and marital therapy to medical students and psychiatric residents; that in those matters he dealt with matters relating to nudity; that in the family planning unit in Tulane he was looking at the psychiatric aspects of family planning including human sexuality (A 67); that he maintained a marital therapy practice and took a limited number of patients referred to him by either psychiatrists or obstetricians in the New Orleans area. (A 68)

He stated that he had seen both, "It All Comes Out In The End" and "Magic Mirror." (A 69) Asked if those films had an appeal to the average adult's prurient interest in sex, he stated it was his opinion that they would not. (A 70) Asked why? He stated, "I just simply don't believe that the average normal American adult has a prurient in sex. I think that if the average American adult walked into one of these theaters and sees a movie such as this, that he is exhibiting a normal healthy sexual interest rather than a prurient or morbid or sick interest." (A 70)

Asked if those movies had any values to society, he answered, "Yes." Asked his opinion as to those values, he stated that many normal healthy American adults have a great curiosity about other forms of sexuality, (A 70) that they have fears about their own human sexuality and to go to a movie like this would help eliminate some of those fears; that a person who was normal and healthy who had fears that he might be a homosexual might go into a movie

such as this and see that depiction of the homosexual and say, "My God, I am not like that," or he might say, "I'm like that" and go seek help. So the movie might get him to come to a professional and to seek help. Also women have fears about their breasts being a normal size or abnormal size, do they have more pubic hair or less than others, and and so do males. Of course, the last movie wouldn't have helped any" He further stated that these kind of movies in general helped to eliminate fears and helped to satisfy curiosity about sexual matters. (A 71)

He quoted statistics from the Presidential Commission regarding the percentage of men and women who voluntarily expose themselves to this kind of material and concluded his testimony with the statement that, "I'm seeing more and more of the couples going to these theaters, married couples, and so forth. I think personally these movies appeal to the normal American adult, and I don't think it is a prurient interest, I think it is a healthy interest in sex." (A 71, 72)

On cross-examination by Mr. Moran he stated that he didn't see any activities in the movies that were beyond the normal range of human sexual activity as he knew it to be from dealing in this area with a great many patients and with a great many people at large; (A 72) that his opinions came from surveys made by himself on sexual attitudes; that he had seen only half of the film, "Magic Mirror" and had never testified in a film case before, (A 73) but had in two other cases involving obscenity; one in Federal Court in New Orleans and the other in Memphis; that Mr. Jack Peebles in New Orleans retained him in the former case which was still unresolved and that Mr. Smith retained him in the later case where the material was found to be not obscene. (A 74)

Asked if sex films had a therapeutic value, he stated,

yes, for that portion of the community that would like to see this kind of material or had curiosity about it. Asked if such a film would stimulate an interest or curiosity in sex, he answered, "I would hope that the normal healthy American male or female would be sexually stimulated by sexual material." (A 74) Asked for what purpose the sex film was made, he stated, "The only value I can see in this kind of film would be perhaps some educational value for persons who are curious about this kind of thing and perhaps some amusement value." (A 75)

Asked if sexual activity in his judgment would have to either have one, an erect penis, or two, a worldly view of the insertion for intercourse to be taking place before he would determine it was sexual intercourse, he answered, "Yes, sir." (A 77)

Asked if the orgy scenes would contribute to the welfare of the community, he stated, "It depends upon your moral judgments about some other things. For instance, if a couple was curious about wife swapping, or something like this and they could substitute some fantasy by seeing a film such as this rather than the actual thing, I think it might be good for the community. (A 78) Asked whether such a scene could encourage someone who had not considered wife swapping to experiment in this field, he said, "No, I don't believe so," and stated that they serve as a fantasy substitute more than they do to encourage activity and that "the life of the action of these movies and books is around four hours, that they don't stimulate (psychologically) much beyond four hours." (A 78)

Asked for what purpose these films were produced, he answered, "For entertainment, to try to draw in a crowd, to fill the theater up." (A 79) Asked if a nude female in the act of fellatio would be entertainment, he answered, "Look-

ing at this kind of material has provided entertainment for a great many hundreds of years in one form or another. (A 80) Asked if the films provided entertainment or supplied a morbid curiosity in sex, he answered that the person who goes inside to make trouble rather than to be entertained is morbid. He stated that the films did not contribute anything to his welfare, "and it didn't stimulate me either as far as that goes." He stated he would not pay \$3.00 to see either one of these films. (A 81)

On redirect examination by defense counsel Smith, Dowd stated that he had first been called to testify in the case on Monday morning and that at that time he was advised as to what the films contained. (A 81) He also stated that he had come to the trial with the understanding that if, after seeing the films, he had a different opinion or the films were other than as were described to him, he would not testify. (A 82)

On questioning by the Court he was asked the significance of the scene in "Magic Mirror" at the end where a young man was shot by a police officer and there was this dramatic gushing of blood as he is killed, "there was no emotion shown on the part of the girl as to the death and all the rest of the rather blase approach towards it, what relationship does that have, . . . does that exacerbate sex feelings or what, what does it do?" (A 82) He answered, "By violence, not only in any film, but as far as I am concerned they don't need to do that kind of thing . . . what I really object to, a few weeks ago, four weeks ago or so there was a Life Magazine that comes into my home. . . . showing heads lopped off or who had committed Hari Kari just grizzly, gastly things that to me are obscene and should not be permitted to intrude in my home, and this I don't approve of even in these movies or in Life Magazine or anywhere

else. Apparently our society is filled with this and it does intrude on us." (A 83) Asked if he perceived that to be for the purpose of arousing greater reaction on the part of the viewer, (A 83) he stated, "I can't imagine that it would and therefore I can't imagine why they put it in. . . . This seems to be true of a lot of these sexually oriented magazines and things they will have a death at the end and I don't really know why." (A 83)

At the conclusion of Dowd's testimony the defense rested.

On April 12, 1971, Judge Etheridge filed his order holding both films not obscene and dismissing the actions. That order read, in part, as follows:

"The State contends that the motion pictures under review in the above actions are obscene. The titles of the films are 'It All Comes Out in the End' and 'Magic Mirror,'

"Assuming that obscenity is established by a finding that the actors cavorted about in the nude indiscriminately, then these films may fairly be considered obscene. Both films are clearly designated to entertain the spectator and perhaps, depending on the viewer, to appeal to his or her prurient interest. The portrayal of the sex act is undertaken; but the act itself is consistently only a simulated one if, indeed, the viewer can assume an act of intercourse or of fellatio is occurring from the machinations which are portrayed on the screen. Each of the films is childish, unimaginative, and altogether boring in its sameness.

"It appears to the Court that the display of these films in a commercial theater, when surrounded by requisite notice to the public of their nature and by rea-

sonable protection against the exposure of these films to minors, is constitutionally permissible.¹²

"IT IS THE JUDGMENT OF THIS COURT THAT the films, even though they display the human body and the human personality in a most degrading fashion, are not obscene.

"The actions against the Defendants, therefore, are

¹²When this Court granted the petition for writ of certiorari herein, its original order of June 26, 1972, read, in part, as follows: "The parties are requested to brief and argue in addition to those questions presented in the petition the following question: 'Whether the display of any sexually oriented films in a commercial theatre, when surrounded by notice to the public of their nature and by reasonable protection against exposure of the films to juveniles, is constitutionally permissible,'" (Our emphasis.) Through some unpublished subsequent order, the last two words of the original order (and the sense of the jurisdictional question) were changed to read "constitutionally protected." See *Paris Adult Theatre I et al v. Lewis R. Slaton et al.*, U.S. 33 L.Ed.2d 331, S. Ct. (June 26, 1971). Amicus thought the jurisdictional question, as originally phrased, to be more in point and would hope that this Court would come to grips with that issue in writing its opinion.

Judge Etheridge's order held that the exhibition of the films is constitutionally *permissible* and that the policy of the State of Georgia did not proscribe the same. In its opinion, the Georgia Supreme Court said that the judge was wrong, that the judicial policy of the State of Georgia *does* proscribe the same as a *matter of law* and, further, that the films are hard-core pornography. If a majority of this Court adopts the views of the late Justice Harlan re the role of the Federal Government in such matters and finds, as it surely must, that these films are hard-core pornography, then it must also find that the films are condemned as a matter of federal policy and federal law. See Point I A 1 at page 87. Under this view, the Oregon State Legislature might revoke its penal laws dealing with the subject of obscenity, but could not thereby create property rights in "hard-core pornography," so as to create a haven from which to carry on an interstate business which violated the federal statutes. Nor could the State Legislature deny to its citizens their "federal and civil rights" under our Judeo-Christian federal government, one of which is the right of the family to be free from the debasing influence of such materials in the communities. (See Portland, Ore. and Astoria, Ore. news articles on this problem at Appendix F, pages 5 to 6.) If *Roth* is correct, then such rights attach to citizenship in every civilized society. See Point I A 1 at page 87.

dismissed.

"This 12th day of April, 1971."

"On November 5, 1971, the Supreme Court of Georgia, after viewing the films, reversed the trial court decision by Superior Court Judge Etheridge. In its original opinion, dated Nov. 5, 1971, the Court in an unanimous decision, followed its three previous decisions which had affirmed temporary injunctions in three motion picture film cases: *Evans Theatre Corp. v. Slaton*, 227 Ga. 377, 180 S.E.2d 712 (Mar. 4, 1971); *Walter v. Slaton*, 227 Ga. 676, 182 S.E.2d 464 (May 13, 1971), and *1024 Peachtree v. Slaton*, 184 S.E.2d 144 (Oct. 7, 1971). In limiting its review to the "probable cause" issue, the Georgia Supreme Court held the trial court erred in dismissing the temporary injunction. In its original opinion, the Court said:

"As was pointed out in *Walter v. Slaton*, supra, the initial hearing in this kind of proceeding presents for the judge's decision only the question of whether there is probable cause to hold the material in question to be obscene, and therefore, whether the exhibition of a motion picture or the distribution of literature shall be temporarily enjoined until the ultimate question of obscenity can be passed upon by a jury. Therefore, 'on the hearing of an application for an interlocutory injunction, the presiding judge should not undertake to to finally adjudicate issues of fact, but should pass on such questions only so far as to determine whether the evidence authorizes the grant or refusal of the interlocutory relief'"

This original opinion, a copy of which appears hereinafter at Appendix A-1 through A-9, overlooked a stipulation in the record by the attorneys which waived a jury trial and

provided for a final judgment to be rendered by the trial court judge.¹³ See Statement of Facts, at page 10 supra. Upon the filing of petitions for a rehearing by both parties calling this matter to the Court's attention (A 7, 9), the Georgia Supreme Court on November 18, 1971, corrected the matter by nunc pro tunc order and filed a substitute opinion. At the same time it also denied both petitions for a rehearing. The final decision of the Georgia Supreme Court, as reported in 228 Ga. 343, 185 S.E.2d 768 (Nov. 5, 1971) overruled the finding of the trial judge and held both films to be hard-core pornography and obscene as a matter of law.

SUMMARY OF ARGUMENT

I

Somehow, the moral climate in these United States has changed during the past 15 years - a deterioration of major proportions has taken place. Relying upon the value of one picture, as compared to one thousand words, an attempt has been made to rivet this Court's attention on reality by following Solicitor-General Rankin's argumentation in *Roth-Alberts*. Attached to this brief at Appendices, C, D, and E

¹³ It is important that this Court focus its attention on the entire Georgia procedure. There is an intense need throughout this Nation for a solid procedural precedent upon which other states might rely in moving in the courtroom against the deluge of obscenity. Under the Georgia procedure, upon a finding of "probable cause" the trial court is required to issue a temporary injunction. Compare *Wisconsin v. I, A Woman* - Part II 191 NW2, 897, 901 (Nov. 30, 1971). This procedure provides law enforcement with a quick and effective remedy. At the same time, the rights of the defendant are safeguarded. If the defendant sincerely desires a quick, final adjudication as to the "obscenity" issue, he can consolidate the hearing on the temporary injunction with the hearing on the final injunction, as in the *Paris Adult Theatre* appeal herein.

are photographic representations by way of time-motion studies, of a cross-section of the motion picture fare currently playing in this Nation's capitol. Three of the films now playing in September-October 1972 are "Deep Throat," "School Girl" and "Sticky Situation."

Amicus believes, as Sociologist William Kephart has recently stated, that we are *not* living in an era of moral erosion. Erosion, by definition, is a slow, uneven process which is not visible. What we are witnessing, is an era of laceration, which is *highly visible*. It would appear that we are due for a change and the time to begin is *now*!

The motion picture films "It All Comes Out In The End" and "Magic Mirror" are obscene in the "international" sense - "hard-core pornography." As such they are *condemned* under our federal constitution. In its opinion in *Roth-Alberts*, this Court noted that it was the universal judgment of civilized nations that obscenity should be proscribed.

It is a "Judaео-Christian" culture which this Court is called upon to interpret. According to that "Judaео-Christian" base, each citizen has and enjoys a personal civil right to live in an area which is free of the debasing influence of public indecency.

During the past 15 years, a blanket of confusion has engulfed the motion picture production area. That industry's understanding of the public responsibility which it bears under this Nation's obscenity laws has been almost destroyed. Such confusion is due in no small part to the failure of this Court to enunciate a judicial philosophy which truly reflects the public mores which have governed this Nation since its founding. A casual reference to, and brief reflection on the moral laws of this Nation dealing with sexuality

shows that such public mores do *presently* exist and codify the "National standards" which this Court has been seeking to enunciate. Amicus has attached at Appendix B a state-by-state survey of those laws which deal with lewdness, indecent exposure, obscenity, prostitution, sodomy, adultery, fornication, incest and profanity.

This Court has on many occasions stressed community ethical values as the basis for constitutional adjudication and has repeatedly said that "In an unbroken series of cases extending over a long stretch of this Court's history, it has been accepted as a postulate that the primary requirements of decency may be enforced against obscene publications." This Court has also said that the values of the culture can often be detected from the practices of the states. In reviewing the Georgia Supreme Court's ruling, this Court must examine the background of this Nation's well-established ethical values.

One just does not fornicate in public, be it actual or simulated - nor may he on the motion picture screen. Those "values" exist for the benefit of the family unit which is at the very core of government in our Judaeo-Christian culture.

The common standards of right and wrong, as embodied in the law, require that both films be found to be obscene and a matter of law. The Courts have always been willing to take judicial notice of facts of a common or general knowledge and facts which are uncontrovertible.

The performance of sexual intercourse in public, whether real or simulated, live or as part of a motion picture film is against public policy and obscene per se. Justice Douglas has finally been forced to the wall. Having agreed in *Roth-Alberts* that there is nothing in the constitution which prevents a state from proscribing conduct on the grounds of

good morals, and acknowledged that the First Amendment does not permit nudity in public places, adultery or other phases of sexual conduct, he must now tell us how this Court can prevent any State Court from "enjoining" such conduct on the screen. See here the time-motion studies for the films "Magic Mirror" and "It All Comes Out in The End" appearing at pages 11-83 of Amicus' brief. Since oral Sodomy is a crime against public morals, then there is no logical argument which can justify the filming of such conduct and displaying it on the public screen. The Supreme Court of Georgia has, in no uncertain terms, stated "If any semblance of civilization is retained in our country, the States must have standards of conduct permissible in public. There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public."

Where obscenity per se exists, the Court can take judicial notice of that fact, and no further evidence on such issue is necessary. The test, as repeatedly voiced in the courtroom, for obscenity per se is; "whether reasonable men could not differ, and could come to but one conclusion, i.e. that the material or performance is sexually morbid, grossly perverse and bizarre."

The legal principle upon which the Georgia Court's decision is based, i.e., that the public nuisance approach can be applied to restrain obscenity, is fundamental to our law. Under the common law, obscenity, indecency and lewdness were a public nuisance and could be abated by injunction. Joyce in his text "Law of Nuisances" defines public nuisance as an act which offends public decency. In its previous decision in the *Evans Theater* case (which this court

refused to review) the Georgia Supreme Court ruled that a prosecuting attorney had an inherent right to bring an action to enjoin a threatened public nuisance, and such right included the right to stop the exhibition of films which were contrary to the standards of decency of the community as a whole. Other state courts have similarly ruled.

It should be noted that the Georgia legislature has voiced a similar "intent." In Section 61-116 of the Georgia Code, the state legislature, in voiding all leases for structures used for prostitution, expanded the definition of "prostitution" "to include the offering or giving of the body for sexual intercourse, sexual perversion, obscenity, and/or lewdness for hire . . ."

In enjoining such conduct, the Georgia Supreme Court was not attempting to reach private morality — its aim was to control and regulate public morality, which affects the people as a whole. The great majority of people believe that the morals of "bad" people do, at least in the long run, threaten the security of the "good" people. Such moral beliefs, when not demonstrably erroneous, are a proper basis for legislation. The interest being protected, in such cases, is the right of family to shape the moral notions of their children, and the right of the general public not to be subjected to violent psychological affront.

On this latter point, this Court has recognized in *Mugler v. Kansas* that the power to determine what is offensive to public morality is lodged in the legislative branch of government, and not in this Court. This Court's rulings in *Redrup v. New York* and later cases citing *Redrup*, are a clear violation of the principle voiced in *Mugler v. Kansas*.

The indirect effects of obscenity were recognized by Justice Harlan in *Roth-Alberts* where he stated: "The State

can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards." The long range, indirect effects inference, acknowledged by Justice Harlan, was also recognized by a majority of this Court in *Ginsberg v. New York*.

In a civilized society "hypocrisy is the complement that vice pays to virtue." It matters not that, in our present morally weakened society, there are many members of our "adult" community who may personally find it difficult to maintain high principles. It is one thing to say that they have a right to lead an immoral life; it is another thing to say that they have a constitutional right to propagate that immorality in the community. This Court's decisions in *U.S. v. Reidel* and *U.S. v. Thirty-Seven (37) Photographs*, in differentiating *Stanley v. Georgia*, explained that difference. It is inconceivable to Amicus that *Reidel* and *Thirty-Seven Photographs* have not already decided the questions herein.

There is a justifiable ground for the regulation of obscenity in whatever form it might take, whether it be criminal prosecution, qui tam action, injunction, or by some or all of the remedies in combination. That choice is in the state courts and state legislatures.

The films "Magic Mirror" and "It All Comes Out in The End" are clearly obscene as a matter of law. See here, the time-motion studies at pp 11-83.

ARGUMENT

INTRODUCTION

When this Court, a little over 15 years ago, heard arguments on the obscenity issue in *Roth v. U.S.*, 354 U.S. 476, hard-core pornography was a rarely seen under-the-counter item. At that time, the Federal Government worked hard at keeping it under control. In the Government's brief in *Roth v. U.S.*, (at page 34) the Solicitor-General identified "hard core pornography" as one of three categories of materials which were caught in the net of the Federal Obscenity Statute, and estimated the same to encompass 90% of the total materials actually caught under the Federal Statute. To make sure that the individual members of this Court understood what was meant by that "underworld" term and that rarely seen item, the Solicitor-General, by letter to the Clerk of this Court, dated Apr. 19, 1957, sent numerous samples of actual hard-core pornography to the Court.

Somehow, the moral climate in these United States has changed during the past 15 years - a deterioration of major proportions has taken place which, in turn, has fed itself back into the system, and accelerated the rate of decline. Nowhere is this change more apparent than in the area of public morals (sexual). Amicus doubts that this modern phenomenon has escaped the attention of any member of this Court; yet, recognizing the tragic certitude of Pope's Quatrain on the "Monster Vice"¹⁴ and relying upon the value of one picture when compared with the use of words, an attempt has been made herein to rivet this Court's attention on reality by following Solicitor-General Rankin's illus-

¹⁴See footnote 4, *supra*, at page 4.

trative argumentation noted above.¹⁵ Attached to this brief, at Appendices C , D and E are photographic representations, by way of time-motion studies, of a cross-section of the motion picture fare currently playing in this Nation's capitol as this Court sits in judgment on the recent actions taken by the Supreme Court of Georgia in their attempt to bring under control the proliferation of hard-core pornography on the public motion picture screens in that State.

The three motion picture films, "School Girl," "Deep Throat" and "Sticky Situation," which appear as time-motion studies in the Appendix herein, are presently playing at the Trans-Lux (14th and H St., N.W.), the New Plaza (New York Ave. and 14th St., N.W.) and the Playhouse (15th and H St., N.W.) Theaters, located in the shadows of the White House and the buildings which house Congress, and just a stone's throw from the stately structure and regal splendor in which this Court sits.¹⁶ Amicus would emphasize that such films are no longer the under-the-counter, items which this Court considered 15 years ago via the illustrative arguments used by Solicitor-General Rankin.¹⁷

¹⁵See also Amicus' Motion To Affirm in the "Vixen" case, No. 71-599, at Appendix E, pp. 2-5, wherein a cross-section of the new "Hollywood" in California was examined for purpose of argument by means of a diagram of a 4½ square mile area in the center of Hollywood, and photographs showing 74 retail outlets therein, dealing in hard-core pornographic materials.

¹⁶If this Court does not recognize such illustrated argument as autoptical proof of a society which is turning to Sodom and Gomorrah, then proof on the score does not exist, either in fact or in theory, which will instruct the justices on that proposition.

¹⁷Amicus submits that the justices of this Court, in considering the nature of their individual responses herein, would do well to re-examine the moral arguments made by the Solicitor-General in his brief in *Roth v. U.S.*, *supra*. See Briefs of Counsel, appearing at 1 L.Ed.2d 2199-2203.

In the year 1972, they are openly advertised in the newspapers and favorably reviewed.¹⁸ Nor is this situation local - those films are playing in cities around the Nation, both large and small, and without police opposition, which has been "throttled" by this Court.¹⁹

In a recent writing, published on Sept. 1, 1972, William Kephart, PhD, Professor of Sociology at the University of Pennsylvania, made the following observations on the above state of affairs, which are adopted herein as Amicus, opening remarks in support of affirmance herein:

"It is sometimes said that we are living in an era of moral erosion, but this is obviously not so. Erosion, by definition, is a slow, uneven process, barely discernible to the human eye. From this perspective, our shoreline of morality is not eroding. It is *being lacerated*. (Emphasis his.)

"Rates of divorce, venereal disease, crime and delinquency, adultery, fornication, rape, illegitimacy, and drug addiction increase with a tempo that makes economic inflation look sluggish by comparison. And while, in a sociological sense, it is not possible to pinpoint the relationship between these accelerating social problems on the one hand, and the increase in

¹⁸ See the motion picture ad, appearing in the Washington Post, dated Sept. 25, 1972, at page B8, a copy of which appears at Appendix F, page 2, showing "School Girl," "Deep Throat" and "Sticky Situation" playing at the Trans-Lux, New Plaza and Playhouse Theaters. See also the motion picture reviews for those films in Daily and Weekly Variety and Box Office, copies of which appear at Appendix F, pp. 12 et seq.

¹⁹ See the Los Angeles Times Movie Ads of Oct. 7 & Sept. 29, 1972, copies of which appear at Appendix F, pages 3 and 7, which announce that "School Girl" is now playing in its fourth month at the "Cinema Theatre" in Los Angeles.

obscenity and pornography on the other, this much seems certain: if there were no relationship, the coincidence would be one of the most remarkable in the social history of our country. (Emphasis his.)

"My own feeling is that obscenity and pornography are reflective of a permissive philosophy which - while it carries the familiar seal of the Warren Court and the automatic blessing of the intellectual community - goes against the mainstream of America.

"There are two bright spots in the kaleidoscope. (1) Moral laceration (which is highly visible) is easier to counteract than moral erosion (which is practically invisible over the short-term). For reasons best known to themselves, those who believe in a permissive philosophy have pushed the rest of us too far, too fast. A reaction, while certainly not inevitable, would seem to be the next stage in a logical sequence. (2) Self-evidently, our present laws dealing with morality do not reflect the will of the people. And as sociologists have been reminding us ever since Prohibition, laws mores are in vain.

"In the struggle between the 'moralists' and the immoralists, the latter have held the offensive for some time now. It would appear that we are due for a change. And as they say in the theater, Please to begin . . ."

I.

THE MOTION PICTURE FILMS "IT ALL COMES OUT THE END" AND "MAGIC MIRROR" ARE NOT PROTECTED EXPRESSION UNDER THE FEDERAL CONSTITUTION. ON THE CONTRARY, THEY ARE CONDEMNED BY IT.

A. The Motion Picture Films "It All Comes Out In The End" and "Magic Mirror" Are Obscene In The International Sense (Hard-Core Pornography) And As Such Are Condemned Under The Federal Constitution.

In its opinion in *Roth-Alberts*, 354 U.S. 476, 1 L. Ed.2d 1498, 77 S.Ct. 1304 (June 24, 1957, this Court noted that it was the universal judgment of civilized nations that obscenity should be proscribed. See *Roth-Alberts* at p. 484:

"... implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. . . ." (Our emphasis.)

If government is to have meaning, the laws must be interpreted according to the cultural base from which the law is drawn. According to that base "indecenty" does have a concrete value. This Court has not yet seen fit to overrule *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892) It is a "Judaeo-Christian" culture which this Court is called upon to interpret. If the laws of the land, according to that "Judaeo-Christian" base, uniformly proscribe public indecenty, then each citizen has and enjoys a per-

sonal right under that government to live in an area which is free of public indecency. Amicus submits that, for this Court to refuse to acknowledge and enforce that value is to fail to recognize civil rights in the citizenry accruing and existing under the Fifth, Ninth, Tenth and Fourteenth Amendments of the Federal Constitution and the corresponding sections of the State Constitution - civil rights which are enforceable under the law, irrespective of whether or not criminal penalties are attached.

During the past 15 years, a blanket of confusion has engulfed the motion picture production area and all but destroyed that industry's understanding of the public responsibility which it bears under this Nation's obscenity laws. Such confusion²⁰ is due in no small part to the failure of this Court to enunciate a judicial philosophy which truly reflects the public mores which have governed this Nation since its founding. A casual reference to and brief reflection on the moral laws of this Nation dealing with sexuality, as codified by the state legislatures (see Appendix B pp. 1-16 is cogent proof that such public mores do presently exist and are well defined. See also, *City of Youngstown, Ohio v. DeLoreto*, 251 N.E.2d 291, 48 Ohio Op. 2d 393 at 400 (Sept. 10, 1969); *State of Ohio ex rel. Ewing v. Without A Stitch*, 57 Ohio Op. 2d 184 at 187 (July 9, 1971); and *State of Ohio*

²⁰The Court in *People v. Kirkpatrick*, 316 N.Y.S.2d 37 (Oct. 28, 1970) had the following to say at page 42 on this general confusion as it related to the criminal law:

"There is perhaps no area of criminal law in such utter state of confusion and frustration as that visited upon the publication and dissemination of obscene material 'Confusion now hath made its masterpiece' (*Macbeth*, Act II).

"The confusion, in great measure, must be attributable to the incredible divergence of views of the men on the United States Supreme Court, to whom all look for guidance . . ."

ex rel. Keating v. Vixen, 272 N.E.2d 137 at 140, 27 Ohio St. 2d 278 (July 21, 1971).

1. THE COMMON STANDARDS OF RIGHT AND WRONG EMBODIED IN THE STATUTORY LAW OF THIS NATION AND THE STATE OF GEORGIA SHOULD BE APPLIED AS THE RULE OF LAW IN THIS CASE IN FINDING THE TWO FILMS TO BE OBSCENE AS A MATTER OF LAW.

It is the basic contention of Amicus that the eyes of this Court, in reviewing the Georgia Supreme Court ruling below, should be focused upon the concepts which support the statutes being applied by Respondents, that is the universal verity that lewdness and obscenity are public nuisances, which are abatable under the law, and the ethical values shared by this Nation, as a whole, as defined in the legislative halls and documented in state and federal statutes and city ordinances. A state-by-state survey of the Nation's laws dealing with lewdness, indecent exposure, obscenity, prostitution, sodomy, adultery, fornication, incest and profanity is attached as Appendix "B". Appellants submit that these laws define the national standards which everyone in the courtroom today is seeking to ascertain.²¹ This Court has on many occasions stressed community ethical values as the basis for constitutional adjudication. *Adamson v. Calif.*, 332 U.S. 46, 91 L.Ed. 1908, 67 S.Ct. 1672 (Justice Frankfurter concurring opinion). *Louisiana ex rel Francis v. Resweber*, 329 U.S. 459, 470, 91 L.Ed.422, 67 S.Ct. 374 (concurring opinion). In *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 1 L.Ed.2d 1489, 77 S.Ct. 1325, handed down on the same date as the *Roth-Alberts* decision, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (June 24, 1957), Justice

²¹See footnote 12 at page 75.

Frankfurter, in speaking for the majority of that Court in a case closely paralleling the matter herein, said, at page 1473:

"In an unbroken series of cases extending over a long stretch of this Court's history, it has been accepted as postulate that 'the primary requirements of decency may be enforced against obscene publications.' *Id.* 283 U.S. at 716." (Our emphasis.)

In *Solesbee v. Balkcom* (1950), 339 U.S. 9, 16, 27, 94 L.Ed. 604, 70 S.Ct. 457, Reh. Den. 339 U.S. 926, 94 L.Ed. 1348, 70 S.Ct. 618, Justice Frankfurter wrote that due process

"embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just. The more fundamental the beliefs are, the less likely they are to be explicitly stated. But respect for them is of the very essence of the Due Process Clause. In enforcing them this Court does not translate personal views into constitutional limitations. In applying such a large untechnical concept as 'due process,' the Court enforces those permanent and pervasive feelings of our society as to which there is compelling evidence of the kind relevant to judgments on social institutions."

The values of the culture, Justice Frankfurter added, can often be detected from the practices in the states. He illustrated the point in this fashion: "The manner in which the states have dealt with this problem furnishes a fair reflection, for purposes of the Due Process Clause, of the underlying feelings of our society about the treatment of persons

who become insane while under sentence of death."

In reviewing the ruling of the Georgia Supreme Court which abated both films as a *matter of law*, this Court should judicially recognize that it was in the background of this Nation's well-established and shared ethical values that the producers of those films opted to move into the motion picture entertainment field and capitalize commercially via sensationalism, upon the natural abhorrence of civilized government to public displays of explicit sexual conduct. *One just does not fornicate in public, be it actual or simulated* -- nor may he on the public screen. (See Judge Burke's opinion, *infra* at page 93 .) The relevant historical facts under consideration certainly encompass this Nation's ethical values, as reflected in the well-knit pattern of city, state and federal laws relating to public sexual conduct (such as laws dealing with nudity, fornication, prostitution, indecent exposure, sodomy, solicitation of unnatural sex act, etc.) Those values exist for the benefit of the family unit which is at the very core of government in our Judaeo-Christian culture and are deserving of this Court's strong support.

The common standards of right and wrong embodied in the statutory law of Georgia should be applied as the rule of law in this case in upholding the Georgia Supreme Court's finding that the films "It All Comes Out In The End" and "Magic Mirror" are **UNLAWFUL AS A MATTER OF LAW**. This was the view of the unanimous Ohio Court in *City of Youngstown v. De Loreto*, 251 N.E.2d 491 (September 10, 1969). In *De Loreto*, the court enumerated the state statutes and city ordinances which prohibited specific immoral conduct. From that the court deduced what the Moral Standards of Ohio People on Sex were. (See *De Loreto* at pages 500

and 501. See also *Ohio ex rel Ewing v. "Without A Stitch"*, 276 N.E.2d 655 at 659 (July 9, 1971) and *Ohio ex rel Keating v. "Vixen"*, 272 N.E.2d 137 at 141 (July 21, 1971).

It is the prerogative of this Court to take judicial notice of the laws of the State of Georgia relating to sexual morality and apply them in reviewing the issue of obscenity in this case.

The vast history of the Common Law and the statutes of the State of Georgia make clear those particular areas of public conduct which are so immoral, so contrary to the immemorial custom of propriety of the people, so opposite to the natural sense of conscience and justice of the people, so pervasively at odds with the community notions of right and wrong, so consistently maintained as illegal and contrary to Anglo-American public policy that their display and exhibition to the public, either live or recorded, is UNLAWFUL AS A MATTER OF LAW. Obscenity, public indecency, incest, lewdness, immoral exhibitions, sexual perversion, and sodomy et seq., all are enumerated acts the public portrayal of which a judge should recognize as being part of the Common Law specification of "obscenity." See Appendix B. - 4 "Georgia."

The courts have always been willing to take judicial notice of those facts and policies that are of general and incontrovertible knowledge. Such matters include those facts of a common or general knowledge that are well and authoritatively settled, not doubtful or uncertain, and known to be within the limits of the jurisdiction of the court. (28 Am. Jur.2d Sec. 34) They also have included a recognition of the ordinary instincts, passions, emotions, and motives which universally, in a greater or lesser degree, influence the actions and conduct of mankind. (28 Am. Jur.2d Sec. 114)

In addition, judicial notice has been extended to matters of public and social welfare (29 Am.Jur.2d Sec. 143) and the customs and usages of man which are generally known or accepted to an extent sufficient to make them matters of common knowledge. (28 Am.Jr.2d Sec. 121)

2. THE PERFORMANCE OF SEXUAL INTERCOURSE
IN PUBLIC, WHETHER REAL OR SIMULATED,
LIVE, OR AS PART OF A MOTION PICTURE FILM
OR STAGE PLAY IS AGAINST PUBLIC POLICY
AND AS SUCH IS OBSCENE PER SE:

By far the best legal opinion on this point of law is that of Judge Burke's speaking for the majority of the New York Court of Appeals in *Trans-Lux Dist. Corp. v. Bd. of Regents*, 248 N.Y.S.2d 857 (Mar. 26, 1964), at page 857:

"While typically applicable to 'speech' and 'press' in the forms known to the framers, the guarantee of the First Amendment has been read to include anything that is asserted to be someone's way of saying something. The most familiar instances of this application are physical conduct and motion pictures (*Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098, *supra*). Cases involving conduct as a form of expression have been frequent in labor law and provide a useful illustration of the transition from a somewhat doctrinaire application of the First Amendment (see e.g., *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, *supra*) to a realization that, while conduct may be speech, it still remains conduct and does not cease to present its unique problems of

social control. It is now the law that even peaceful picketing may be forbidden where it violates State labor laws that are not themselves designed as restrictions on freedom of speech (Local Union No. 10, etc., Plumbers Union v. Graham, 345 U.S. 192, 72 S.Ct. 383, 97 L.Ed. 946). Conduct that is proscribed for valid public purposes is not immune merely because engaged in with a view to expression (Giboney v. Empire Ice & Storage Co., 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834). For example, in *People v. Stover*, 12 N.Y.2d 462, 240 N.Y.S.2d 734, 191 N.E.2d 272, supra, app. dsmd. for want of a substantial Federal question, 375 U.S. 42, 84 S.Ct. 147, 11 L.Ed.2d 107, this court upheld an 'Aesthetic' ordinance prohibiting the display of soiled laundry on a clothesline in the defendants' front yard, despite the fact that the display was an expression of social protest.

"Films, by their nature, may lie on either side of the division between speech and conduct. The opinions of the Supreme Court reversing this court in the cases of advocacy of adultery and thematic sacrilege make that plain. But it also follows that if 'picketing may include conduct other than speech, conduct which can be made the subject of restrictive legislation' (Giboney v. Empire Ice & Storage Co. supra, 336, U.S. p. 501, 69 S.Ct. p. 690, 93 L.Ed. 834) then so may films. In this regard, it will be noted that the Supreme Court has not yet expressed its opinion in a case involving allegedly obscene behavior on the screen"

And at page 860:

"In *Kingsley Intern. Pictures Corp. v. Regents*, 360 U.S. 684, 79 S.Ct. 1362, 2 L.Ed.2d 1512, the opin-

ion of the court repeatedly distinguishes between the right to communicate any idea, however deviant from orthodoxy, and 'the manner of its portrayal' (360 U.S. p. 688, 79 S.Ct. p. 1365, 3 L.Ed.2d 1512). The 'freedom to advocate ideas' was protected, not any supposed right to behave lewdly in a public place. Even more to the point is the concurring opinion of Mr. Justice Clark who wrote: 'I see no grounds for confusion, however, were a statute to ban "pornographic" films, or those that "portray acts of sexual immorality, perversion or lewdness."' If New York's statute had been so construed by its highest court I believe it would have met the requirements of due process. Instead, it placed more emphasis on what the film teaches than on what it depicts. There is where the confusion enters.' 360 U.S. p. 702, 79 S.Ct. p. 1372, 3 L.Ed.2d 1512; emphasis in original).

"It is my view that a filmed presentation of sexual intercourse, whether real or simulated, is just as subject to State prohibition as similar conduct if engaged in on the street. I believe the nature of films is sufficiently different from books to justify the conclusion that the critical difference between advocacy and actual performance of the forbidden act is reached when simulated sexual intercourse is portrayed on the screen. I take it to be conceded that New York may constitutionally prohibit sexual intercourse in public. As Mr. Justice Douglas acknowledge, dissenting in *Roth v. U.S.* . . . in contrasting books with conduct: 'I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe conduct on the grounds of good morals. No one would

suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct' (emphasis in text).

"This observation is equally pertinent, of course, whether the sexual exhibitionism is done spontaneously in the street or in theaters for money (e.g., Penal Law, Consol. Laws. c.40, §§ 43, 1140, 1140-a, 1140-b). There have been many cases dealing with what sort of behavior was covered by statutes against sexual exhibitionism and the like, but they were solely concerned with statutory interpretation, never, obviously, the First Amendment. (Miller v. People, 5 Barb. 203; People v. Burke, 243 App. Div. 83, 276 N.Y.S. 402, affd. 267 N.Y. 571, 196 N.E. 585; People v. Mitchell, 296 N.Y. 672, 70 N.E.2d 168; People v. Dash, 282 N.Y. 632, 25 N.E.2d 979.)

"This comparison between the acknowledged competence of the State to forbid public or semi-public sex displays and its power to exert similar control over similar conduct depicted on the screen is not intended to imply any broad theory of legal equivalence between real conduct and a filmed imitation. Indeed, the meaningful comparison exists only in a narrow range of cases. In most instances, the real conduct is illegal because of what is accomplished by the person, as in murder, forgery, or adultery. In such cases, the filmed dramatization obviously does not share the evil aimed at in the law applicable to the real thing. Where, however, the real conduct is illegal, not because of what is accomplished by those involved, but simply because what is done is shocking, offensive to see, and generally believed destructive of the general level of moral-

ity, then a filmed simulation fully shares, it seems to me, the evil of the original. In such cases, the free expression protection of the First Amendment must apply to both or neither. It makes no sense at all to say that the conduct can be forbidden but not the play or film.

"The pattern of statutory regulation in New York aims at offensive - more properly, obscene - displays of conduct whether in the street (Penal Law, §§ 43, 1140, 1140-b), on the street (Penal Law, § 1140-a; *People v. Vickers*, 259 App. Div. 841, 19 N.Y.S.2d 165 - lewd dance) or on the screen (Penal Law, §§ 1140-a, 1141; Education Law, § 122). These laws care not about the communication of ideas (see *Stromberg v. California*, 283 U.S. 369, 51 S.Ct. 532, 75 L.Ed. 1117); they are aimed at certain narrow sorts of conduct. It seems to me, therefore, that if the defendants in *People v. Stover*, *supra*, could constitutionally be prohibited from selecting the forbidden form of conduct as the vehicle for the communication of their protest, then this petitioner cannot choose acted-out sexual intercourse as the vehicle for its art (see, also, *People v. Vickers*, *supra*, where a performer was prohibited from choosing a certain sort of dance as her vehicle, and the 'nude gymnasium' prohibited by Penal Law, §§ 1140-b). Numerous other instances also suggest themselves.

"If we can accept the obvious - that sexual intercourse whether performed in the park or simulated on the stage or screen is in itself a form of conduct (in which the public have an interest), it is apparent that when this defendant chooses to use it as a vehicle for the expression of art it has 'brigaded' the communica-

tion (to the extent that it is 'communication') with conduct completely. In so doing the petitioner has subjected itself to such regulations as are appropriate to the conduct when engaged in for reasons having nothing to do with expression. There is otherwise no difference between advocacy and action. (Compare *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 738, 84 L.Ed. 1093, with *Local Union No. 10, etc., Plumbers Union v. Graham*, 345 U.S. 192, 73 S.Ct. 535, 97 L.Ed. 946.) 'Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it' (Douglas, J., dissenting in *Roth v. United States*, 354 U.S. 476, 514, 77 S. Ct. 1304, 1324, 1 L.Ed.2d 1498)."

Judge Burke's closing principle, stated at page 863 is a complete answer to the claims of petitioner that the "educational" and "entertainment" aspects, testified to by defense witness Dowd, constituted "value" and offered a meritorious defense. (See Dowd's testimony at pages 70 to 73).

"To all argument predicated on artistic merit as decisive of the constitutional question, it is sufficient answer to say that artists are not such favorites of the law that they may ply their craft in the teeth of a declared overriding public policy against pornographic displays. Since no other profession is privileged to bend public morals, public and law to its internal craft standards, then neither should producers of films."

A majority of the California Supreme Court appear to be in agreement with Justice Burke. See *Billie Dixon, Riachrd Bright and Michael McClure v. Municipal Court of City and County of San Francisco*, 267 Cal. App.2d 875, 73 Cal. Rptr. 587 (Dec. 2, 1968). Hearing denied January 29, 1969.

(with Justices Peters, Tobriner and Mosk dissenting) involving the stage play "The Beard." Justice Devine, speaking for an unanimous court (Court of Appeal, First District, Division 4) said at page 589:

"There are several sexual acts which, although not criminal in themselves, as is oral copulation, doubtless would be deemed by many a trier of fact applying First Amendment standards to be obscene even when contained in a play or a dance or other performance with full First Amendment protection. It is entirely possible that the simulation of such acts, and of the act in 'The Beard,' would itself be an obscene act. The positions and motions of the performers, the duration of the act, the accompanying dialogue and all of the circumstances, taken together with the content of the entire work, may establish an imitation of an actual deed to be obscene.

The same principle was recently voiced by the Georgia Supreme Court in its decision in *Evans Theatre Corp. et al. v. Slayton (supra)* holding the motion picture film "I Am Curious (Yellow)" to be enjoinable as a public nuisance because of the sexual activity portrayed therein:

"The Criminal Code of Georgia makes penal a lewd performance in public, including an act of sexual intercourse and a lewd appearance in a state of nudity. Code Ann. § 26-2011 (Ga. L. 1968, pp. 1249, 1301). such acts are prohibited, not because of the injury inflicted on other individuals, as in the case of murder or robbery, but because the acts are offensive to the majority of the people. If any semblance of civilization is retained in our country, the States must have standards of conduct permissible in public. There is little difference in the effect on the public between lewd con-

duct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public." (Our emphasis.)

3. WHERE OBSCENITY PER SE EXISTS THE COURT CAN TAKE JUDICIAL NOTICE OF SUCH FACT AND NO FURTHER EVIDENCE ON SUCH ISSUE IS NECESSARY.

In *Mitchum v. State of Florida*, 251 So.2d 298 (Aug. 12, 1971) the District Court of Appeal of Florida made the following comment as to the application of judicial notice to material which was uncontrovertibly obscene:

"Examination of appellants' argument under this point indicates that the real issue raised is the contention that the absence of testimonial evidence, separate and apart from the magazines themselves considered as exhibits, renders the order of the lower court prejudicially erroneous and therefore reversible.

"In support of the latter proposition, appellants rely heavily on Justice Frankfurter's concurring opinion in *Smith v. California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205, reflecting his view, not that of the court, that expert testimony is necessary to a finding of obscenity by a court. That view being found only in a concurring opinion is, of course, not binding upon us as precedent nor are the holdings in the obscenity cases from several of our sister states which require testimonial evidence as a predicate for a finding of obscenity necessarily binding on this court. We have read them, of course, and while they appear sound and scholarly, they simply do not reflect our view of the law relating to the subject matter. In essence, those

cases encroach upon the entire concept of judicial notice as approved by our courts as well as those of other jurisdictions. Long ago, it was held that in proper circumstances "judicial notice" is superior to evidence since it fulfills the object which evidence is designed to fulfill and makes evidence on the point established by judicial notice unnecessary. *Amos v. Moseley*, 74 Fla. 555, 77 So.619. It is designed as the cognizance of certain facts which judges and jurors may properly take and act upon without proof, because they already know them. *United States v. Hammers*, D.C., 241 F. 542. Courts are presumed to know what everyone knows, 13 Fla. Jur., Evidence § 14. Thus, the question resolves itself into whether the materials here involved are of such character as to establish circumstances whereunder the court may determine the obscenity question without evidence. (Emphasis ours.)

"We hold that the materials herein are 'hard-core pornography' and therefore within the rule announced in *United States v. Wild*, 422 F.2d 34 (2d Cir. 1970) cert. denied 402 U.S. 986, 91 S.Ct. 1644, 29 L.Ed.2d 152, reh. den. 403 U.S. 940, 91 S.Ct. 2242, 29 L.Ed.2d 720. There the government introduced no evidence other than the materials themselves which was claimed to be error. In rejecting the contention, the Court of Appeal reviewed the pertinent cases and held as follows:***.

"In a remarkably similar case in which a conviction under section 1461 was unanimously affirmed, Judge Prettyman wrote:

"Most of the difficulty which enshrouds the discussion of the law concerning obscenity and filth develops upon consideration of books and magazine

articles. Here arise problems of scierter, the meaning and effect of the whole, the value of the work to proper interests of the public, the contemporary community standards in similar matters, and other baffling problems under our precious right of free speech. Discussed in several opinions in *Smith v. California* (361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205). But we have no such problem in the case of bar. These are stark, unretouched photographs - no text, no possible avoidance of scierter, no suggested proper purpose, no conceivable community standard which would permit the indiscriminate dissemination of the material, no alleviating artistic overtones. These exhibits reflect a morbid interest in the nude, beyond any customary limit of candor. They are "utterly without redeeming social importance," * * * *

"We think that photographs can be so obscene - it is conceivably possible that they be so obscene - that the fact is uncontrovertible. These photographs are such. United States v. Womack (Womack v. United States), 111 U.S. App. D.C. 8, 294 F.2d 204, 205-206 (footnote omitted), cert. denied 365 U.S. 859, 81 S.Ct. 826, 6 L.Ed.2d 822 (1961)." (Emphasis ours.)

"See also, Kahm v. United States, 300 F.2d 78 (5th Cir.), cert. denied 369 U.S. 859, 82 S.Ct. 949, 8 L.Ed. 2d 18 (1962); United States v. Davis, 353 F.2d 614 (2d Cir. 1965), cert. denied 384 U.S. 953, 86 S.Ct. 1567, 16 L.Ed.2d 549 (1966). Cf. Manual Enterprises v. Day, 370 U.S. 478, 489-490 and n. 13, 82 S.Ct. 1482, 8 L.Ed. 2d 639 (1962) (opinion of Harlan, J.) * * * *

"(5,6) The above views expressed by the court in Wild were adopted by this court in the informative opin-

ion of this court in *Collins v. State Beverage Department*, 239 So.2d 613 (Fla. App. 1970). It is clear then that the rule in this jurisdiction is that if the materials before the court are what is termed 'hard-core pornography' no testimonial evidence is necessary to support a finding of obscenity * * * *"

In *Morris v. U.S.*, 257 A.2d 341 (Dec. 2, 1969) the Court voiced the following test for material which was "obscene *per se*," i.e., obscene as a matter of law:

"Although the definition and elements of obscenity have been authoritatively stated in *Roth* and *Memoirs*, definition of the oft-used terms 'hard-core obscenity,' and 'obscenity *per se*' has been neglected by the Supreme Court. The Court of Special Appeals of Maryland has faced this problem before and has defined these terms in the following language: Hard-core pornography or obscenity *per se* is obscenity which 'focuses predominantly upon what is sexually morbid, grossly perverse and bizaare without any artistic or scientific purpose of justification.' There is no desire to portray (it) in pseudoscientific or 'arty' terms. It can be recognized by the insult it offers, invariably, to sex and to the human spirit. It goes substantially beyond customary limits of candor and deviates from society's standards of decency in the representation of the matters in which it deals. It has a patent absence of any redeeming social value; it speaks for itself and screams for all to hear that it is obscene. It is not designed to be a truthful description of the basic realities of life as the individual experiences them but its main purpose (is) to stimulate erotic response. . . . No proof, other than the viewing of it, is required to deter-

mine if it is, in fact, obscene.

"It is clear to this court that where obscenity per se is involved, the prosecution is not required to offer any evidence (beyond the material or performance itself) that it is pornographic or obscene or that it is below the national community standards. *Womack, supra*; *Hudson, supra*. In other words, if reasonable men could not differ and they could come to but one conclusion, i.e., that the material or performance is sexually morbid, grossly perverse, and bizarre, without any artistic or scientific purpose or justification, then the Government on its case-in-chief need not offer any evidence of national community standards." (Our emphasis.)

See also *Wilhoit v. U.S.*, 279 A.2d 505, cert. den. 30 L.Ed.2d 546 (Dec. 14, 1971) (Douglas would grant cert. and set the case for argument). *Mitchum v. State of Florida*, 251 S.2d 298 at 301 (Aug. 12, 1971); *U.S. v. Womack*, 111 U.S. App. D.C. 8, 294 F.2d 204, cert. den. 365 U.S. 859, 81 S.Ct. 826, 5 L.Ed.2d 822 (Mar. 27, 1969); *U.S. v. Wild*, 422 F.2d 34 (Oct. 29, 1969), cert. den. 402 U.S. 986, 91 S.Ct. 1644, 29 L.Ed.2d 152, rehrg. den. 403 U.S. 940, 91 S.Ct. 2242, 29 L.Ed.2d 720 (June 21, 1971); *Mitchum v. State of Florida*, 244 S.2d 159, 160 (Jan. 26, 1971); *Collins v. State Beverage Dept.*, 239 S.2d 613, 616; *Marks v. State of Florida*, 262 S.2d 479 (May 23, 1971); *Kaplan v. U.S.*, 277 A.2d 477 at 479 (May 10, 1971); *Illinois v. Ridens*, 282 N.E.2d 691 at 695 (Mar. 21, 1972); *State of Minn. v. Getman*, 195 N.W.2d 827 at 829 (Mar. 17, 1972); Justice Herndon dissenting in *Harmer v. Tonylyn Productions*, 100 Cal. Rptr. 576, 579 (Mar. 2, 1972); *United Theatres of Florida v. State ex rel Gerstein*, 259 S.2d 210, 212

(Feb. 15, 1972); *U. S. v. Miller*, 455 F.2d 899 at 902 (Mar. 22, 1972).

In *Boreta Enterprises, Inc., v. Dept. of Alcohol Beverage* 2 Cal. 385, 84 Cal. Rptr. 113 at 123 (Feb. 26, 1970), Justice Sullivan writing for a majority of the California Supreme Court, acknowledged that the conduct at issue could be so extreme as to properly conclude that the subject matter was "per se" contrary to public morals, at page 123:

"This, however, is not the focal point of our present inquiry. We here examine the power invested by the Constitution in the Department to revoke a specific alcoholic beverage license 'if it shall determine for good cause that the . . . continuance of such license would be contrary to public . . . morals' (Cal. Const. Art. XX, § 22, italics added; see fn. 4, *ante*.) This requires us to observe the distinction between the imperatives of the moral order and the mandates of the civil order. It is therefore the public morals, not the private morals of the officials or employees of the Department, however conscientious or well-intentioned, which must be the criteria in the instant case. In other words, in resolving the issue before us, our reference must be to the morals of the people, that is, to those of the community at large, of the whole body of the people. (See *Duskin v. State Board of Dry Cleaners* (1962), 58 Cal.2d 155, 163, 23 Cal. Rptr. 404, 373 P.2d 468; see definition of 'public,' Black's Law Dictionary (4th ed. 1951); Webster's Third New International Dict.) If by 'morals' we mean 'the moral practices of an individual, or culture; habits of life or modes of conduct' (Webster's *op. cit.*, see 'moral') we think the term 'public morals' must be taken to mean the moral prac-

tices or modes of conduct 'pertaining to a . . . whole community; . . . relating to . . . the whole body of people or an entire community.' (Black's Law Dictionary, *supra*; *Duskin v. State Board of Dry Cleaners, supra.*)

"There may be cases in which the conduct at issue is so extreme that the Department could conclude that it is *per se* contrary to public morals. By this we mean that it is so vile and its impact upon society is so corruptive, that it can be almost immediately repudiated as being contrary to the standards of morality generally accepted by the community after a proper balance is struck between personal freedom and social restraint. . . ." (Italics theirs.)

In *Smith v. Commonwealth of Kentucky*, 485 S.W.2d 918, 920 (Feb. 26, 1971) the Kentucky Court of Appeals similarly followed the same rules:

"Appellant moved for a directed verdict of acquittal at the close of the Commonwealth's evidence, on the ground that no proof had been presented to show that the questioned matter was utterly without redeeming social value. The court properly overruled that motion, inasmuch as the publication demonstrated on its face that it possessed no such redeeming social value. That determination was properly made as a matter of law in the circumstances of this case" (Our emphasis.)

4. THE LEGAL PRINCIPLE UPON WHICH THE GEORGIA COURT'S DECISION IS BASED i.e., THAT THE PUBLIC NUISANCE APPROACH CAN BE APPLIED TO RESTRAIN OBSCENITY, IS FUNDAMENTAL TO OUR ANGLO-SAXON LAW.

(a) UNDER THE COMMON LAW, OBSCENITY, INDECENCY AND LEWDNESS WERE A PUBLIC NUISANCE.

Obscenity or indecent exhibitions of a nature to shock the public sense of decency were a public nuisance and indictable at the Common Law. *Crain v. State*, 3 Inc. 193 (1951). In Perkins on Criminal Law, Foundation Press, 1954, Professor Rollin Perkins states, at page 336:

"Obscene or indecent exhibitions of a nature to shock the public sense of decency are also public nuisances and indictable at Common Law. This label includes not only obscene and indecent theatrical performances or side shows, but other disgusting practices such as letting a stallion to mares in the streets or some other public place"

For a modern application of this principle to some of the current problems which face this Nation, see *Bloss v. Paris Township*, 157 N.W.2d 260 (Apr. 1, 1968) holding the operation of an outdoor drive-in theater showing motion pictures which "dwell on the subject of sex and the human anatomy" to constitute a public nuisance. In *Bloss*, the Michigan Supreme Court stated the following, as to the nature of such public nuisances, at page 261:

"What is a public nuisance? Joyce, Law of Nuisances, Section 7, page 15, defines a public nuisance, inter alia, as an act which offends public decency.

Cited to Section 86, page 13, is the case of *Hayden v. Tucker*, 37 Mo. 214, in which it was held that the keeping of jacks and stallions within the immediate view of a private dwelling and a public highway is a nuisance which equity will enjoin as a 'disgusting annoyance perpetually bringing the blush of shame to modesty and innocence.' The factual difference between the *Hayden* and the instant case, is that there involved was a display of equine and here pictures of the human frame, is not a distinction calling for a different conclusion as to the nuisance question."

Similarly, in *Cactus Corporation d.b.a. The Apache Drive-in v. State of Arizona, ex rel Murphy*, 480 P.2d 375 (Feb. 9, 1971), the Court of Appeals of Arizona, Division 2, recently affirmed the judgment of the trial court which permanently enjoined The Apache Drive-in Theater from displaying, showing or running a motion picture film, entitled "Lysistrata," or any other motion picture film of the same character, on the grounds that such activity is or would be a public nuisance as defined by A.R.S. Sect. 13-601, which defines, in part, a public nuisance as:

"Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by a considerable number of persons"

"On March 4, 1971, the Georgia Supreme Court, in an unanimous decision, upheld the inherent right of law enforcement officials to enjoin the motion picture film "I Am Curious (Yellow)" as a public nuisance. In *Evans Theatre Corp.*

et al. v. Slayton, Dist. Atty. of Fulton County, Ga., 180 SE.2d 712 (Mar. 4, 1971), Presiding Judge Mobley, speaking for an unanimous court, said:

"We recognize the principle that equity will take no part in the administration of the criminal law. Code § 55-102. However, it has long been the rule in this State that the State has an interest in the welfare, peace, and good order of its citizens and communities, and that an action may be maintained at the instance of the prosecuting attorney to enjoin an existing or threatened public nuisance, even though the nuisance constitutes a crime punishable under the criminal laws. See: *Lofton v. Collins*, 117 Ga. 434 (3), 440 (43 SE 708, 61 LRA 150); *Walter v. McNelly*, 121 Ga. 114 (1), 115 (48 SE 718); *Edison v. Ramsey*, 146 Ga. 767 (92 SE 518); *Dean v. State*, 151 Ga. 371 (1) (106 SE 792, 40 ALR 1132); *Gullatt v. Collins*, 139 Ga. 538 (150 SE 825); *Rose Theatre, Inc. v. Lilly*, 185 Ga. 53 (1) (192 SE 866); *Atkinson v. Lam Amusement Co.*, 185 Ga. 379 (195 SE 156); *Forehand v. Moody*, 200 Ga. 166 (36 SE2d 321); *Norris v. Willingham*, 204 Ga. 441 (50 SE2d 22); *Thornton v. Forehand*, 211 Ga. 568 (87 SE2d 865); *Lee v. Hayes*, 215 -Ga. 330, 331 (110 SE2d 624).

"The exhibition of an obscene motion picture is a crime involving the welfare of the public at large, since it is contrary to the standards of decency and propriety of the community as a whole. The welfare of the whole community is served by restraining the showing of such an obscene film.

"A court of equity was authorized to enjoin the exhibition of this obscene motion picture to the public."

In the *Evans Theatre Case*, this Court denied review. See *Evans Theatre Corp. et al v. Slayton*, Dist. Atty. of Fulton County, U.S. 30 L.Ed.2, 267 S.Ct. (Nov. 9, 1971). See also *Judson v. Zurhorst*, 30 Ohio Cir. 9, at Page 14, where the Ohio court said:

"There remains one contention for the granting of this injunction on the facts alleged in the petition. That is on the alleged indecency of the pamphlet. The law does not favor obscenity or indecency.

"In a proper case instituted by one legally authorized to represent the public, the public exhibition of lewd pictures, immodest statuary, or immoral plays would unquestionably be enjoined, or otherwise suppressed; and for the same reason an obscene book or pamphlet is prohibited transit through the United States mail"

In *State of Ohio ex rel Keating v. A Motion Picture Film Entitled "Vixen" et al.*, 272 N.E.2d 137 (July 21, 1971), Amicus, as a private citizen, brought an abatement action against the exhibition of the motion picture "Vixen" in Cincinnati, Ohio (Hamilton County) under Section 3767.01 et seq., of the Ohio Revised Code, which authorizes a private party to bring such action. In that trial, the statute was upheld as against a claim of constitutional invalidity and the exhibition of the film at an indoor movie was held to be a public nuisance in Hamilton County. An appeal to the Court of Appeals, First Appellate District of Ohio, a similar attack was made against the statute on constitutional grounds, and as applied to the film itself. On July 20, 1970, the Court of Appeals, First Appellate District of Ohio upheld the constitutionality of the statute the principle involved and after trial *de novo*, declared the exhibition of the

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film to be a nuisance in the counties of Ohio in which it had jurisdiction. The Ohio Supreme Court affirmed the lower court's judgment and that matter is presently before this Court. On March 13, 1971, the Clerk of the Court was directed to obtain the film for the Court's viewing.

Section 8767.01 et seq., of the Ohio Revised Code was recently before a 3-judge federal district court, convened under 28 U.S.C. Sections 2281-2284, upon a claim of the unconstitutionality of such statute. In that case, *Grove Press, Inc. et al. v. Anthony B. Flask*, 325 F. Supp. 574 (March 10, 1970), the court, in an unanimous decision (Celebreeze, Battisti and Green), upheld the constitutionality of the statute and its application in an abatement of the motion picture film, "I Am Curious (Yellow)" as a public nuisance. On July 6, 1970, Grove Press, Inc. filed its appeal in the United States Supreme Court. See *Grove Press, Inc. v. Flask*, October Term 1970, No. 360. As of this date, no action has been taken by this Court in this matter.

On the issue of whether indecency in the form of public lewdness in theatrical performances can be stopped in a civil action to abate a public nuisance in California, see *Weis v. Superior Court of San Diego County*, 30 Cal. App. 730, 159 P.464 (June 14, 1916). In *Weis*, that issue was before the District Court of Appeals, 2nd District, on a writ of prohibition. The District Attorney had commenced a civil action under Code of Civil Procedure, Section 731, to abate a theatrical performance on the ground that it was a public nuisance. The complaint alleged that under a concession granted by the Panama-California International Exhibition, the defendant was conducting upon the exposition grounds a public resort and place of amusement and entertainment, known as the "Sultan's Harem," in which certain women did

make in the presence of the general public a public exhibition and exposure of their naked person and private parts, which performance was alleged to be indecent and offensive to the senses and a public nuisance. The California court dismissed the defendant's application for a preemptory writ holding the action was properly brought. At page 465, the court said:

"While the acts here complained of clearly constitute a crime, they also constitute a nuisance within the meaning of Section 3479 of the Civil Code, which defines a nuisance as 'anything which is . . . indecent or offensive to the senses . . . so as to interfere with the comfortable enjoyment of life or property' (Emphasis ours.)

"And Section 3480 of the same Code defines a public nuisance as: 'One which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or danger inflicted upon individuals may be unequal.'

"Mr. Joyce in his work on Nuisances, Section 409, says: 'A disorderly and disreputable theater may be enjoined although a common nuisance.'

"To the same effect is Wood on Nuisances, Section 68, where it is said: 'A public exhibition of any kind that tends to the corruption of morals, to a disturbance of the peace, or of the general good order and welfare of society, is a public nuisance. Under this head are included . . . obscene pictures and any and all exhibitions, the natural tendency of which is to pander to vicious . . . and disorderly members of society.'"

The *Weis* decision and rationale was cited with approval

by the California Supreme Court in *People v. Lim*, 18 Cal.2d 372, 118 P.2d 472 (Nov. 27, 1941). In the *Lim* case, the California Supreme Court noted, at page 476:

"Similarly in *Weis v. Superior*, 30 Cal. App. 730, 159 P.464, it was held that the District Attorney of San Diego County was authorized under Code of Civil Procedure, Section 731, to enjoin the performance of a public exhibition which was shown to have been indecent, and thus within the statutory definition of public nuisances in Civil Code Section 3749 The courts have thus refused to grant injunctions on behalf of the State except where the objectionable activity can be brought within the terms of the statutory definition of public nuisance" (Our emphasis.)

The theatrical performance in *Weis* was in the nature of a "concession" on the Exposition grounds. The latter fact infers that the performance was a commercial activity and was not visible to the public's eye without the payment of an admission price. See the recent decisions of this Court in *U. S. v. Reidel* 402 U.S. 351 (May 3, 1971) *Thirty-Seven (37) Photographs* 402 U.S. 363 (May 3, 1971) which accord no constitutional protection to such commercial activities.

More recently, the California Supreme Court indicated in dictum that it presently adheres to the Common Law rule noted above. In *Burton v. Municipal Court of the Los Angeles Judicial District of Los Angeles County*, 68 Cal. 2d 684, 441 P.2d 281, 68 Cal. Rptr. 721 (June 6, 1968), a licensing case involving the exhibition at a theater of films claimed to be obscene, that Court cited with approval the Abatement Statute which codifies the principle employed by the Georgia Supreme Court. While denying the right of an administrative board to refuse a license on an administrative fact finding

that the theater was a nuisance, the court pointed to the judicial Abatement Statute as a proper procedural employment of the "nuisance" concept. At page 728, the court said:

"¹⁵Section 103.31(b), under which the board may deny a permit 'for a business which has been or is a public nuisance' is likewise defective. The Civil Code defines a nuisance as 'Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any **public park, square, street, or highway * * *.' (Civ. Code § 3479) Section 3480 defines a public nuisance as 'one which affects at the same time an entire community or neighborhood, or any number of persons * * *.' (See also, Pen. Code, §§ 370, 371.)

"The provisions of Section 103.31(b) are no less vague than those of Sections 103.29(b) and 103.31(c) 1. To permit a board to refuse to grant a license for the operation of a motion picture theater because in its subjective opinion the operation may be 'indecent or offensive to the senses * * so as to interfere with the comfortable enjoyment of life or property of 'any considerable number of persons' obviously vests in the board an exorbitant quantum of discretion and fails to meet the constitutional requirement of narrowly circumscribed standards.

"¹⁶ We note in passing that the law provides ample methods for eliminating the existence of a nuisance, by indictment or information, or by the bringing of a civil

suit or an action for abatement. (Civ. Code § 3491) It is, of course, within the authority of a municipal legislative body to prescribe what constitutes a nuisance. (Gov. Code, § 38771; *City of Bakersfield v. Miller* (1986), 65 Cal. 2d 93, 100, 48 Cal. Rptr. 889, 410 P.2d 393.) However, the policy board is not a legislative agency, and we are not concerned here with whether particular activity has been properly defined as a nuisance but only with whether an administrative board may refuse to grant a permit to petitioners because in its subjective opinion the business which they operate 'has been or is a public nuisance.'" (Our emphasis.)

In *People ex rel Hicks v. "Sarong Gals"* 103 Cal. Rptr. 414 (Aug. 3, 1972) the Court of Appeal in California was faced with a case involving subject matter which differed from the type of conduct herein, only, in that there the "lewdness" was "live," rather than "filmed." In upholding the application of the Red Light Abatement Law to abate, as a nuisance, continuing acts of lewdness sans evidence of prostitution, the Court held at page 417:

"The behavior described in the instant case amounts purely and simply to an exhibition calculated to arouse latent sexual desires and release the inhibitions of the viewers rather than a mode of expressing emotion and dramatic feeling by the performer.

"While our Supreme Court has held that amusement and entertainment as well as the expression of ideas are encompassed within the right of freedom of speech (In re Giannini, *supra*, 69 Cal.2d 563, 569, 72 Cal. Rptr. 655, 446 P.2d 535; *Weaver v. Jordan*, 64 Cal.2d 235, 242, 49 Cal.Rptr. 537, 411 P.2d 289), entertainment value per se does not give an activity redeeming social

importance. Presumably, the Romans of the First Century derived entertainment from witnessing Christians being devoured by lions. Given the right audience, the spectacle of a man committing an act of sodomy on another man would provide entertainment value. However, neither this spectacle nor the activities described in the instant case are invested with constitutionally protected values merely because they entertain viewers. However chaotic the law may be in this field, no court has as yet adopted such an extreme result.

"Public display such as those described above are within the type of public nuisances traditionally within the power of the state to regulate and prohibit. They involve no significant countervailing First Amendment consideration. Attempts to present this type of commercialized lewdness under the mantle of the First Amendment under a concept of communication of ideas stretches reason.

"We hold that the "entertainment" described in the instant case is lewd and, therefore, not afforded the protection of freedom of speech under the First Amendment. The acts of the "entertainers" or "dancers" in the instant case were purely and simply obscene acts performed for the purpose of inciting the sexual desires and imaginations of a group of randy, beer drinking patrons. As such, these acts amount to conduct not protected by the First Amendment. The prevention of these acts does not hinder the market place of ideas or freedom to distribute information and opinion."

In answering arguments that the legislature did not intend the statute to encompass that type of activity, the

court said at page 416:

"Defendants contend that when the Red Light Abatement Law was enacted (1913), the Legislature did not have in mind the type of activity described above."

"This is apparently true. History does not record the existence of any topless-bottom-less bars offering the type of entertainment described herein in 1913. Western folklore has it that prostitutes were good-hearted wenches who bedded their customers with no shilly-shallying around, nursed the sick in times of emergency, eventually married homesteaders and became pillars of the community. However, even prior to 1913, the exploitation of sexual desires for profit was apparently recognized as a social problem. Thus the Legislature specifically included lewdness as one of the grounds of the court's power to curb a public nuisance. In *People v. Bayside Land Co.*, 48 Cal.App. 257, 191 P. 994, the court held that lewdness - even though no incidents of prostitution or assignation had occurred - came within the Red Light Abatement Law."

Carried as a footnote, the Court also made the following observation:

"It can be argued with equal persuasion that the authors of the First Amendment to the United States Constitution would be more than a trifle shocked were they to discover some of the more bizarre behavior now protected by that amendment's lofty concept of freedom of speech."

It should be noted that the legislative "intent," in Georgia follows the broad interpretation given to the term "lewdness" by the California Court in the "Sarong Gals" case, and is in harmony with the decision of the Georgia Supreme

Court below. Section 61-116 of the Georgia Code makes all leases and agreements for the letting of structures for purposes of prostitution to be void, and specifically states that "The term 'prostitution' as used in this law shall be construed to include the offering or giving of the body for sexual intercourse, sexual perversion, obscenity and/or lewdness for hire . . ." (Our emphasis.)

(b) THE RIGHT TO PROSCRIBE OBSCENITY IS A TENTH AMENDMENT RIGHT, GUARANTEED BY THE BILL OF RIGHTS WHICH RESERVES TO THE STATES AND TO THE PEOPLE THE RIGHT TO CONTROL AND REGULATE "PUBLIC MORALITY" i.e., PUBLIC CONDUCT, WHICH AFFECTS THE PEOPLE AS A WHOLE. OBSCENITY CONTROLS DO NOT ATTEMPT TO REACH "PRIVATE MORALITY."

Obscenity controls do not attempt to reach *private morality* such as what a person may read or see. The proscription of obscenity is grounded upon the legitimate governmental aim of controlling and regulating "public morality" - public conduct, which affects the people as a whole.

Although it is true that the governmental restraints imposed by such obscenity laws must, of necessity, *indirectly* restrict the availability of such materials for some persons who might wish to see movies, such as are involved herein, that same result is obtained whenever any "vice" laws are enforced, such as those proscribing prostitution. It would be, however, a gross distortion of the law to suggest that this indirect effect on private morals is the basis for such criminal sanctions and thus an unconstitutional infringement on the rights of an individual.

Law and morality are not identical. Although interrelated, they are necessarily distinct. Not every moral evil is proscribed by man-made law. Public morality is to be distinguished from private morality, as to which it is often said, the law does not concern itself. On the other hand, our law has always recognized the importance of maintaining a high public morality.

Nowhere was the function of such "vice" laws more clearly stated than in the arguments of the prosecutor two and one-half centuries ago in the first obscenity conviction in *Rex v. Curl*, 2 Strange 789 (1727):

"3. As to Morality. Destroying that is destroying the peace of the government for government is no more than public order, which is morality. My Lord Chief Justice Hale used to say Christianity is part of the law, and why not morality too? I do not insist that every immoral act is indictable, such as telling a lie, or the like; but if it is destructive of morality in general, if it does, or may, affect all the King's subjects, it then is an offense of a public nature. And upon this distinction it is that particular acts of fornication are not punishable in the Temporal Courts (Common Law courts) and bawdy houses are. In Sir Charles Sedley's case it was said, that this Court is the *custos-morum* of the King's subjects. 1 Sid. 168." (Our emphasis.)

Louis B. Schwartz, co-reporter of the Model Penal Code, explains the governmental function of the obscenity crime in society as follows, in 63 Columbia Law Review, *Morals Offenses*, and the Model Penal Code (cited by this Court with approval in *Ginzburg v. U.S.*, 16 L.Ed.2d 38, fn. 12; page 39, fn. 14, page 41, fn. 19; *Mishkin v. N.Y.*, 16 L.Ed. 2d 53, fn. 9; and *Stanley*, 394 U.S. 557, fn. 10) at page 671:

"But the great majority of people believe that the morals of 'bad' people do, at least in the long run, threaten the security of the 'good' people . . . it is hard to deny people the right to legislate on the basis of their beliefs not demonstrably erroneous, especially if these beliefs are strongly held by a very large majority. The majority cannot be expected to abandon a credo, and its associated sensitivities, however irrational, in deference to a minority's skepticism."

And at page 672:

"If unanimity of strongly held moral view is approached in a community, the rebel puts himself, as it were, outside the society when he arranges himself against those views . . . the community cannot be expected to make (his) first protests respectable or even tolerated by the law . . ."

Mr. Schwartz continues, at page 681:

"But equally, it is not merely sin-control of the sort that evoked Professor Henkin's constitutional doubts. Instead, the community is merely saying, 'Sin, if you must, in private. Do not flaunt your immoralities where they will grieve and shock others. If we do not impose our morals upon you, neither must you impose yours upon us, undermining the restraint we seek to cultivate through family, church, and school.' The interest being protected is not directly or exclusively, the souls of those who might be depraved or corrupted by the obscenity, but the right of parents to shape the moral notions of their children, and the right of the general public not to be subjected to violent psychological affront." (Our emphasis.)

Concerning the power of government to regulate matters relating to public morals and power to say what is offensive to public morality, this Court said in *Mugler v. Kansas*, 123 U.S. 623 (1887):

"The power to determine such questions (what is offensive to public morality) so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding their own appetites or passions, may be willing to imperil the peace and security of many, provided only they are permitted to do as they please. Under our system that power is lodged in the legislative branch of the government. It belongs to that department to exert what are known as police powers of state, and to determine primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety"

(Our emphasis.)

See also, Federal District Judge Peirson Hall speaking on "The Monster Vice" in *U.S. v. Four (4) Books*, 289 F. supp. 972 at 973 (Sept. 10, 1968), cited herein at p.4 footnote 4.

The existence of the vice of obscenity is the symptom of a disorder which probability tells us, will lead to ruin. Historian Arnold Toynbee tells us that 19 out of the 21 great civilizations which flourished in world history, crumbled into ruin . . . not because of armed aggression from without but because of moral decay from within. In 1874 Justice Swayne, speaking for an unanimous United States Supreme Court in *Trist v. Child*, 21 Wallace 441, 450 (1874) had the following to say about the nature of the underpinnings of this Nation:

"The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed the fabric must fall. Such is the voice of history"

In sum, the case for the governmental action against obscenity was stated by the Associate Justice Harlan in his concurring opinion in *Roth v. U.S.*, 354 U.S. 476, 77 S. Ct. 1304, 1 L.Ed.2d 1498 (June 22, 1957), at page 502:

"The state can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards"

The long range indirect effects inference, accepted by Mr. Justice Harlan, was acknowledged by a majority of this Court in *Ginsberg v. N.Y.*, 390 U.S. 629, 20 L.Ed.2d 195, 86 S.Ct. 942, where the Court referred to the observations of psychiatrist Dr. Gaylin (with apparent approval) at page 642, fn. 10:

" . . . but despite the vigor of the ongoing controversy whether obscene material will perceptively create a danger of anti-social conduct, or will probably induct its recipient in such conduct, a medical practitioner recently suggested that the possibility of harmful effect to youth cannot be dismissed as frivolous. Dr. Gaylin of the Columbia University Psychoanalytic Clinic, reporting on the view of some psychiatrists in 77 Yale Law Review at 592-593, said:

"It is the period of growth (of youth) when these patterns of behavior are laid down, when environmental stimuli of all sorts must be integrated into a

workable sense of self, when sensuality is being defined and fears elaborated, when pleasure controls. It is in this period, undramatically and with time, that legalized pornography may conceivably be damaging.'

"Dr. Gaylin emphasizes that a child might not be as well prepared as an adult to make an intelligent choice as to the material he chooses to read:

"'Psychiatrists . . . made a distinction between the reading of pornography, as unlikely to be per se harmful, and the permitting of the reading of pornography, which was conceived as potentially destructive. The child is protected in the reading of pornography by the knowledge that it is pornographic, i.e., disapproved. It is outside of parental standards and not a part of his identification processes. To openly permit implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval - another potent influence on the developing ego.'"

It seems obvious to Amicus herein that, in the context employed, those members of this Court who joined in that opinion must have recognized the "indirect" effects on public morals in the nature of a scandal-giving seduction, i.e., "public nuisance."

A nation whose public morals are preoccupied with sex is thought to be sick. The ultimate evil would be a society in which sex pictures, novels and magazines are available at every store, sex pictures on every marquee, sex movies in every theater, sex pictures in every art gallery, and sex language in every dialogue. To the extent that we have

attained that status, we must acknowledge that we have lost control of public order and are closing the gap on the public morality of the ancient community of "Sodom and Gomorrah." The anti-social conduct of today's society becomes the socially acceptable conduct of the new community. Recognizing that the evolution of man in civilized society is a slow-moving process, Amicus respectfully suggest that the individual members of this Court should examine and consider the suggestion that in the biblical days of Sodom and Gomorrah there must have been justices whose liberal views on public morality contributed to the destruction of those two cities. It matters not that in our present morally weakened society, there are many members of our "adult" community who may personally find it difficult to maintain high principles. In a civilized society hypocrisy is the complement that vice pays to virtue.

During the past two years, the above stated concepts relating to the legitimate interest of government in controlling and regulating "public morality" have been subjected to a constant and determined attack, under a claim that the Federal Constitution required that obscenity should be immune where commercially exhibited to consenting adults in an enclosed theater. This erroneous misconception, arising out of an interpretation placed on the recent decision of the United States Supreme Court in *Stanley v. Georgia*, 394 U.S. 557, 22 L.Ed.2d 542, 89 S.Ct. 1243 (Apr. 7, 1969) was finally laid to rest on May 3, 1971, by this Court's decisions in *U.S. v. Reidel* (*supra*) and *U.S. v. Thirty-Seven (37) Photographs* (*supra*). In *U.S. v. Reidel*, Justice White, speaking for six members of the Court, said at page 815:

"Section 1461 of Title 18, U.S.C., prohibits the knowing use of the mails for the delivery of obscene matter.

The issue presented by the jurisdictional statement in this case is whether §1461 is constitutional as applied to the distribution of obscene materials to willing recipients who state that they are adults. The District Court held that it was not. We disagree and reverse judgment."

and at page 816:

"In *Roth v. United States*, 354 U.S. 476 (1957), Roth was convicted under §1461 for mailing obscene circulars and advertising. The Court affirmed the conviction, holding that 'obscenity is not within the area of constitutionally protected speech or press' *id.*, at 485, and that §1461, 'applied according to the proper standard for judging obscenity, do(es) not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited.' *Id.*, at 492. Roth has not been overruled. It remains the law in this Court and governs this case. Reidel, like Roth, was charged with using the mails for the distribution of obscene material. His conviction, if it occurs and the materials are found in fact to be obscene, would be no more vulnerable than was Roth's.

"*Stanley v. Georgia*, 394 U.S. 557 (1969), compels no different result. There, pornographic films were found in Stanley's home and he was convicted under Georgia statutes for possessing obscene material. This Court reversed the conviction, holding that the mere private possession of obscene matter cannot constitutionally be made a crime. But it neither overruled nor disturbed the holding in *Roth*. Indeed, in the Court's view, the constitutionality of proscribing private pos-

session of obscenity was a matter of first impression in this Court, a question neither involved nor decided in Roth. The Court made its point expressly: 'Roth and the cases following that decision are not impaired by today's holding. As we have said, the states retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home.' Ibid. Nothing in Stanley questioned the validity of Roth insofar as the distribution of obscene material was concerned. Clearly the Court had no thought of questioning the validity of §1461 as applied to those who, like Reidel, are routinely disseminating obscenity through the mails and who have no claim, and could make none, about unwanted governmental intrusions into the privacy of their home. The Court considered this sufficiently clear to warrant summary affirmance of the judgment of the United States District Court for the Northern District of Georgia rejecting claims that under Stanley v. Georgia, Georgia's obscenity statute could not be applied to book sellers. Gable v. Jenkins, 397 U.S. 592 (1970)."

In U.S. v. Thirty-Seven (37) Photographs (*supra*) the same majority of six came to an identical holding in a case involving the right of the Federal Government to seize obscene materials at the point of entry into this country and to institute a civil action in the federal courts to declare the subject matter to be contraband and subject to forfeiture. Mr. Justice White, writing for four members of the Court, held as follows, at page 833:

"We next consider Luros' second claim, which is based upon Stanley v. Georgia, *supra*. On the authority of Stanley, Luros urged the trial court to construe the

First Amendment as forbidding any restraints on obscenity except where necessary to protect children or where it intruded itself upon the sensitivity or privacy of an unwilling adult. Without rejecting this position, the trial court read Stanley as protecting, at the very least, the right to read obscene material in the privacy of one's own home and to receive it for that purpose. It therefore held that § 1305(a), which bars the importation of obscenity for private use as well as for commercial distribution, is overbroad and hence unconstitutional.

"The trial court erred in reading Stanley as immunizing from seizure obscene materials possessed at a port of entry for the purpose of importation for private use. In *United States v. Reidel*, ante, we have today held that Congress may constitutionally prevent the mails from being used for distributing pornography. In this case, neither Luros nor his putative buyers have rights which are infringed by the exclusion of obscenity from incoming foreign commerce. By the same token, obscene materials may be removed from the channels of commerce when discovered in the luggage of a returning foreign traveler even though intended solely for his private use. That the private user under Stanley may not be prosecuted for possession of obscenity in his home does not mean that he is entitled to import it from abroad free from the power of Congress to exclude noxious articles from commerce. Stanley's emphasis was on the freedom of thought and mind in the privacy of the home. But a port of entry is not a traveler's home. His right to be let alone neither prevents the search of his luggage nor the seizure of

unprotected, but illegal, materials when his possession of them is discovered during such a search. Customs officers characteristically inspect luggage and their power to do so is not questioned in this case; it is an old practice and is intimately associated with excluding illegal articles from the country"

To use the language of this Court in *U.S. v. Thirty-seven (37) Photographs*, the judicial power to abate "obscenity" as a public nuisance is an "old practice" which is "intimately associated with excluding" morally corruptive articles from the communities.

Amicus emphasizes the relevance and importance of *U.S. v. Reidel* and *U. S. v. Thirty-seven (37) Photographs*, to the issues raised on this appeal and the major problem confronting this Nation insofar as the runaway nature of "public lewdness" on the public screen and elsewhere is concerned. (See pp 11-63 and Appendices "B", "C", "D" and "E".) It is now quite clear from these decisions that (1) actual prior restraints by way of court order, for a reasonable period of time in advance of a final determination of the legal issue by the trial court and after decision by the trial court are constitutional, and (2) no property interest attaches to obscene materials which are possessed for commercial use and (3) the obscene materials can properly be made the subject of forfeiture as contraband.

In Amicus' view, it is inconceivable that all of the issues herein are not already decided by this Court's opinions in *Reidel* (supra) and *Thirty-seven (37) Photographs* (supra).

(c) THERE IS A JUSTIFIABLE GOVERNMENTAL GROUND FOR THE REGULATION OF OBSCENITY BY STATES IN WHATEVER FORM IT MIGHT TAKE.

The power of the State in the area of public morals is broad. In *Kingsley Books, Inc. v. Brown*, 354 U.S. 438, 1 L.Ed2d 1169, 77 S.Ct. 1325 (June 24, 1957) decided on the same date as *Roth-Alberts*, 354 U.S. 476, Justice Frankfurter had the following to say concerning the power of states in this area, at Page 440:

"In an unbroken series of cases extending over a long stretch of this Court's history, it has been accepted as a postulate that 'the primary requirements of decency may be enforced against obscene publications.' *Id.* 238 US at 716. And so our starting point is that New York can constitutionally convict appellants of keeping for sale the booklets incontestably found to be obscene. *Alberts v. California*, decided this day (1 L.ed2d 1948). The immediate problem then is whether New York can adopt as an auxiliary means of dealing with such obscene merchandising the procedure of Section 22-a.

"We need not linger over the suggestion that something can be drawn out of the Due Process Clause of the Fourteenth Amendment that restricts New York to the criminal process in seeking to protect its people against the dissemination of pornography. It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a *qui tam* action or by an injunction or by some or all of these remedies in combination, is a

matter within the legislature's range of choice. See *Tigner v. Texas*, 310 US 141, 148, 84 L.ed1124, 1128, 80 S. Ct. 879, 130 ALR 1321. If New York chooses to subject persons who disseminate obscene 'literature' to criminal prosecution and also to deal with such books as deodands of old, or both, with due regard, of course, to appropriate opportunities for the trial of the underlying issue, it is not for us to gainsay its selection of remedies. Just as *Near v. Minnesota*, 283 US 697, 75 L.ed1357, 51 S.Ct. 625, *supra*, one of the landmark opinions in shaping the constitutional protection of freedom of speech and of the press, left no doubts that 'Liberty of speech, and of the press, is also not an absolute right,' 283 US at 708, it likewise made clear that the protection even as to previous restraint is not absolutely unlimited.' *Id.*, 283 US at 716. To be sure the limitation is the exception; it is to be closely confined so as to preclude what may fairly be deemed licensing or censorship."

5. THE MOTION PICTURE FILMS "MAGIC MIRROR" AND "IT ALL COMES OUT IN THE END" ARE OBSCENE AS A MATTER OF LAW AND A PUBLIC NUISANCE PER SE.

An examination and analysis of the Time-Motion Studies for "Magic Mirror" and "It All Comes Out In The End," appearing herein at pages 11-41 and 43-63 demonstrates beyond all doubt that the Georgia Supreme Court's ruling was plainly correct. "Reasonable men could not differ and could come to but one conclusion" - the test for material which is obscene as a matter of law. See Point 1A3, *supra*, at pages 100-106 and the cases cited therein.

Acts and conduct which result in injury to the people are

a public nuisance. Such injury is manifest from the incessant display of lewdness on the public screen. See the time-motion studies for both films, and note, in particular, the narrative legend for each segment of the film appearing at the bottom of each page.

The visual depiction in public of the above sexual acts, if performed off-stage in 3-dimensional form would be the subject for a criminal complaint. When performed in 2-dimensional form, either realistically or simulated, the same are incontrovertibly contrary to the good morals, common custom, public policy, and common conscience of the community of the Nation as a whole.

By way of illustration, Appellants submit that if Sodomy or sexual perversion is a violation of the law prohibiting "lewdness," then the public display of such acts, real or simulated, by way of motion pictures is also contrary to the public policy and in violation of the obscenity laws as a matter of law. It is no answer to suggest that if this were so, then the motion picture presentation of simulated murder would be illegal. That, of course, would be a *non sequitur*, for there is no law which prohibits the pictorial portrayal of simulated murder, whereas there is an almost universally recognized law which prohibits the pictorial portrayal of indecent public conduct and that is the law against "lewdness" in public displays.

CONCLUSION

For all of the foregoing reasons, the judgment of the

Georgia Supreme Court below, should be affirmed.

Respectfully submitted

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APPENDIX B

CHIEF OF POLICE, CHICAGO, ILLINOIS, REPORT IN
REPLY TO LETTER OF MAY 1, 1937, FROM THE
FEDERAL BUREAU OF INVESTIGATION, U. S. DEPT. OF JUSTICE,
WASHINGTON, D. C., DATED MAY 1, 1937, AND
RECEIVED MAY 1, 1937, AND IN REPLY TO LETTER OF
MAY 1, 1937, FROM THE CHIEF OF POLICE, CHICAGO,
ILLINOIS, DATED MAY 1, 1937, AND IN REPLY TO
LETTER OF MAY 1, 1937, FROM THE CHIEF OF POLICE,
CHICAGO, ILLINOIS, DATED MAY 1, 1937, AND IN
REPLY TO LETTER OF MAY 1, 1937, FROM THE CHIEF
OF POLICE, CHICAGO, ILLINOIS, DATED MAY 1, 1937.

Georgia Southern Coast Survey should be affirmed.

Respectfully submitted

Charles B. Keating, Jr.
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A P P E N D I X A

ORIGINAL OPINION OF GEORGIA SUPREME COURT IN
SLATON et al v. PARIS ADULT THEATRE, et al.,
DATED Nov. 5, 1971, SUPERSEDED ON Nov. 19, 1971,
BY NUNC PRO TUNC ORDER TO PERMIT THE COURT TO
RULE ON THE PROCEEDINGS BELOW AS IF ON A HEAR-
ING FOR A FINAL INJUNCTION (AS PER THE STIPULA-
TION APPEARING IN THE RECORD, WHICH WAS OVERLOOKED
BY THE COURT IN ITS RULING) A-2-A-9.

Decided: Nov. 5, 1971

In the Supreme Court of Georgia

26631 SLATON, District Attorney, Et Al v.
PARIS ADULT THEATRE I, Et Al

1. Where, in a proceeding by the district attorney to have certain motion picture films declared to be obscene and subject to be seized and seeking temporarily and permanently to enjoin the showing of the same, the matter came on for a hearing pursuant to an ex-parte order requiring the defendants to show cause on a day certain 10 days from the issuance of such order why the relief prayed for should not be granted and why a temporary injunction should not issue, it was error for the trial judge on such hearing to finally adjudicate the merits of the case and to dismiss the plaintiff's complaint.
2. The evidence was sufficient to authorize a jury to find that the films involved in this case are obscene. Upon such a finding, their exhibition in a commercial theater to willing adult audiences may be properly enjoined since it is not protected by the first amendment.
3. The denial of a temporary injunction in this case exposed the plaintiff to the hazard that the question sought to be adjudicated might become moot, and under the principle of the balancing of conveniences, it was error to deny a temporary injunction restraining the exhibition of the films.

HAWES, Justice. The appeal in this case is from the judgment and order of the Superior Court of Fulton County

refusing a temporary injunction against the showing by the defendants, Paris Adult Theatre I and Paris Adult Theatre II, of two allegedly obscene motion pictures. Following the procedure approved by this court in *Evans Theater Corp. v. Slaton*, 227 Ga. 377 (180 SE2d 712), and followed in *Walter, et al. v. Slaton*, 227 Ga. 676 (182 SE2d 464), and in *1024 Peachtree Corp., et al., v. Slaton* (No. 26612; decided . . . Lewis R. Slaton, as District Attorney of the Atlanta Judicial Circuit, and Hinson McAuliffe, as Solicitor General of the Criminal Court of Fulton County, filed a complaint against the theaters and named individuals praying for a rule nisi to require the defendants to show cause on a date certain why the motion picture films, "It All Comes Out In The End," and "Magic Mirror," should not be declared obscene and subject to be seized, and seeking in each case an order requiring the defendants to produce the aforesaid motion picture films and that they be temporarily and permanently enjoined from exhibiting the same. The rule nisi was duly issued and served in each case, and an adversary hearing was held pursuant thereto on January 13, 1971 before a Judge of the Superior Court of Fulton County. After viewing the motion pictures and hearing the evidence, the trial judge rendered the following judgment: "The State contends that the motion picture under review in the above actions are obscene. The titles of the films are, "It All Comes Out In The End," and "Magic Mirror." Assuming that obscenity is established by a finding that the actors cavorted about in the nude indiscriminately, then these films may fairly be considered obscene. Both films are clearly designed to entertain the spectator and perhaps, depending on the viewer, to appeal to his or her prurient interest. The portrayal of the sex act is undertaken; but the act itself is consistently only

a simulated one if, indeed, the viewer can assume an act of intercourse or of fellatio is occurring from the machinations which are portrayed on the screen. Each of the films is childish, unimaginative, and altogether boring in its sameness.

"It appears to the Court that the display of these films in a commercial theater, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible.

"IT IS THE JUDGMENT OF THIS COURT THAT the films, even though they display the human body and the human personality in a most degrading fashion, are not obscene.

"The actions against the Defendants, therefore, are dismissed.

"This 12th day of April, 1971.

Jack Etheridge, Judge, Superior
Court of Fulton County, Atlanta
Judicial Circuit."

The appeal is from this order. The grounds of enumerated error are that the court erred in declaring each of the films to be not obscene, in refusing to enjoin the defendant from exhibiting each of said motion pictures, and in dismissing the appellant's complaint against the defendants.

1. As was pointed out in *Walter v. Slaton*, supra, the initial hearing in this kind of proceeding presents for the judge's decision only the question of whether there is probable cause to hold the material in question to be obscene, and, therefore, whether the exhibition of a motion picture or

the distribution of literature shall be temporarily enjoined until the ultimate question of obscenity can be passed upon by a jury. Therefore, "on the hearing of an application for an interlocutory injunction, the presiding judge should not undertake to finally adjudicate issues of fact, but should pass on such questions only so far as to determine whether the evidence authorizes the grant or refusal of the interlocutory relief." *Florida Central R. Co. v. Cherokee Sawmill Co.*, 137 Ga. 815 (6) (74 SE 523); *Kight v. Gilliard*, 214 Ga. 445 (2)(105 SE2d 333); *Smith v. Davis*, 222 Ga. 839, 841 (152 SE2d 870); *Oliver v. Forshee*, 224 Ga. 200, 202 (160 SE2d 828). In the instant case, a question of fact was presented as to whether applying contemporary community standards the dominant theme of the films in question, taken as a whole, is to the prurient interest, and whether they are entirely without redeeming social value. The films themselves were in evidence. They spoke for themselves, and we have reviewed them in the discharge of our function as a court of review, along with the transcript of the oral testimony of the so-called expert witness who testified on the trial on behalf of the defendants as to the redeeming social value of the films, when considered in connection with the films themselves made an issue of fact as to whether the films are obscene, this was a question which, under our procedure, necessarily had to be submitted to the jury upon the final determination of the case, and under the cases last cited it was clearly error for the trial judge to pass an order dismissing the complaint. It cannot be said under the state of the record before this court that a finding in favor of the complainants could not under any conceivably provable circumstances be authorized.

2. Appellees contend, and the judge of the superior court

found that, inasmuch as the evidence in this case shows that the films which the solicitor seeks to seize are shown in a theater which carries on the front thereof the warning that it is for adults only and that "You must be 21 and able to prove it. If viewing the nude body offends you - PLEASE DO NOT ENTER," the exhibition of the films in this context is permissible and that the State cannot, without violating first amendment rights, constitutionally prohibit it. They rely in support of this position upon the case of *Stanley v. Ga.*, 394 U.S. 557, and other Federal and State cases following it. That case, however, is not authority for the position which appellees take. It dealt, not with the commercial distribution of pornography, but with the right of Stanley to possess, in the privacy of his home, pornographic films. In one of the most recent, if not the most recent, case decided by the Supreme Court of the United States dealing with this kind of material that court has expressly limited the scope of Stanley and has thereby effectively answered this contention of the appellees. *U.S. v. Reidel*, U.S. , 23 L.Ed 2d 813, 91 S. Ct. . That case involved the distribution through the mails of an admittedly obscene publication in violation of 18 U.S.C. § 1461. The material was mailed to recipients who responded to a newspaper advertisement which required the recipient to state in his order therefor that he was 21 years of age. Reidel was indicted but the trial court granted his motion to dismiss the indictment, and upon review, the Supreme Court, in reversing that judgment, reiterated the ruling in *Roth v. U.S.*, 354 U.S. 476, 1 L.Ed 2d 1498, 77 S. Ct. 1304, that "obscenity is not within the area of constitutionally protected speech or press." In so ruling, the Supreme Court expressly held that the government could constitutionally prohibit the distribution *

of obscene materials through the mails, even though the distribution be limited to willing recipients who state that they are adults, and, further, that the constitutional right of a person to possess obscene material in the privacy of his own home, as expressed in Stanley, does not carry with it the right to sell and deliver such material. As we view the holding in the Reidel case, it is dispositive of the appellees' contention, and the ruling of the trial court that the showing of these films in a commercial theater under the circumstances shown in this case is constitutionally permissible. The defendants in this case were making sales and delivery of the films involved in the only practical way in which it could be done, that is, by selling to the public the right to come into their theater and view the showing of such films. No reason exists why the sale and delivery of these films should be immune to State control any more than the sale and delivery of multiple copies of an obscene book, pamphlet or magazine. Those who choose to pass through the front door of the defendant's theater and purchase a ticket to view the films and who certify thereby that they are more than 21 years of age are willing recipients of the material in the same legal sense as were those in the Reidel case, who, after reading the newspaper advertisements of the material, mailed an order to the defendant accepting his solicitation to sell them the obscene booklet involved there. That case clearly establishes once and for all that the sale and delivery of obscene material to willing adults is not protected under the first amendment.

Appellee also contends, and the trial judge so found, that the sexual activity depicted in these films is merely simulated, and that, being such, it is not obscene. This contention we unhesitatingly and utterly reject. True, the

activity in the films here involved is not revealed in the explicit detail embodied in the films in the Walter case. But, we held in the Evans Theater case that, "I Am Curious Yellow," depicted hard core pornography. In that case, only simulated sexual activity was involved. The films in this case leave little to the imagination. It is plain what they purport to depict, that is, conduct of the most salacious character. We held that these films may be found to be obscene, and upon such a finding the showing of such films should be enjoined since their exhibition is not protected by the first amendment.

3. Generally, in the granting or denying of a temporary injunction, a wide discretion is vested in the judge of the superior court, and unless some substantial equity has been violated, this court will not control his exercise of that discretion in passing such interlocutory order unless it is shown to have been clearly abused. *Jones v. Johnson*, 60 Ga. 260 (3); *Green v. Fuller*, 223 Ga. 204 (1) (154 SE2d 220); *Mar-Pak Michigan, Inc. v. Pointer*, 225 Ga. 307, 309 (168 SE2d 141); *J. D. Jewell, Inc. v. Hancock*, 226 Ga. 480, 488 (9) (175 SE2d 847). However, where it is clear from the order appealed from that the trial judge did not deny the temporary injunction in the exercise of his discretion, but that his denial was based upon an erroneous interpretation of the law, the foregoing rule does not apply. *Ballard v. Waites*, 194 Ga. 427, 429 (2) (21 SE2d 848), and *cits.* Accordingly, under such circumstances, in reviewing the denial of a temporary injunction, this court should consider whether upon the application of the principle of the balancing of conveniences the denial of a temporary injunction would leave the plaintiff practically remediless in the event he should thereafter establish his right to a permanent injunc-

tion. *Everett v. Tabor*, 119 Ga. 128 (4), 130 (46 SE 72); *Maddox v. Willis*, 205 Ga. 596 (5) (54 SE2d 632); *Stephens v. State Highway Department*, 223 Ga. 713, 714 (1) (157 SE2d 751). Applying the foregoing propositions to the facts of this case, it is apparent that a temporary injunction was necessary in order to protect the jurisdiction of the court and to prevent the case from becoming moot. It follows that the trial judge erred in denying the temporary injunction.

Judgment reversed. All the Justices concur.

State Statutes, Standards

Dealing With

Offenses Against Morality and Decency

ANALYZED BY STATE AND LOCAL LEGAL AGENCIES

Appendix B.**State Statutory Standards****Dealing With****Offenses Against Morality and Decency.****ARRANGED BY STATE AND TOPIC**

defined: "To the greatest extent, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 41-2715 (f)

DECENCY	LEWDNESS	INDECENCY Indec. Ex.	NUDITY	MORAL NUSSANCE	OBSCENE LANGUAGE	ADULTERY	FORNICA- TION	SODOMY	INCEST	PROSTITU- TION
CALIFORNIA										
Penal Code § 261	PC 314, 350 1/2	Obscene live conduct PC 311.6	Topless waitresses and enter- tainers Penal Code	Nuisance: "lewdness, assignation or prostitu- tion..." PC 11225	Vulgar, profane or indecent PC 415	PC 260a 260b	Cohabitation PC 263a 269b	PC 266 269 A	PC 265	Penal Code 647 Nuisance PC 11225
Penal Code § 261.5	PC 11225, et seq. Register of offenders PC 290	Acts en- couraging decency PC 650 1/2	See chas- delin. PC 311 (a)	Nuisance: "indecent or offensive to the senses." CC 1479	same 311.6					
Penal Code § 261.5		Indecent Exposure PC 314		Public nuisance: "indecent" CCP 731						
Penal Code § 261.5		Indec. Ex- hibit... children participating Lab 1388								

When taken as a whole, the predominant appeal of which to the average person applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance." PC 311 (a)

CONNECTICUT										
§ 54-5 et seq. § 54-5A § 54-5B	§ 54-5-15 (see Indecent Exposure)	Indecent Liberties 40-2-32		Nuisance: "lewdness, assignation, or prostitu- tion" 29-15-2		40-9-1 et seq. 40-6-501	40-9-3 40-9-15	Loss of civil rights 29-10-18	40-9-4 et seq. Disqual. for civil rights 29-10-10	40-9-11
		Lewd dis- play or no- torious act of public Indecency 40-9-15		Injunction: 40-9-22 40-7-103						
When taken as a whole, the predominant appeal of which to the average person applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance." 40-9-17										

CONNECTICUT										
§ 54-5 et seq. § 54-5A § 54-5B	§ 54-5-15 et seq.	§ 54-5-15 et seq.	Nudity defined: § 54-5-15 (2)	Nuisance: "lewdness, assignation, or prostitu- tion" 29-15-2	Repealed	§ 54-5-1	(repealed)	Penal Code 76 et seq.	§ 54-5-15	Penal Code 83 et seq.
			See chas- delin. § 54-5-15	Obscenity: Injunction § 54-5-15 § 54-5-200						
When taken as a whole, the predominant appeal of which to the average person applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social value." § 54-5-15										

CONNECTICUT										
§ 54-5 et seq. § 54-5A § 54-5B	Defined § 54-5-15		Nudity defined: § 54-5-15 (a)	"social vices" Nuisance: § 54-5-15 et seq. Nuisance: "lewdness, assignation, or prostitu- tion" 29-15-2 Obscenity: Restraining order in Chancery § 54-5-15		§ 54-5-15 § 54-5-15 § 54-5-15	§ 54-5-15 § 54-5-15 § 54-5-15		§ 54-5-15 § 54-5-15 § 54-5-15	§ 54-5-15 et seq. § 54-5-15
When taken as a whole, the predominant appeal of which to the average person applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social value." § 54-5-15										

When taken as a whole, the predominant appeal of which to the average person applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social value." § 54-5-15

[illegible]

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICA- TION	SODOMY	INCEST	PROSTITU- TION
					INDEX					
Minors 10-2004 et seq.	Open lewd- ness 10-2101	10-4101 "Indecent Nuisance" 10-111	Nudity defined; 10-1100 (2) Nudity (minors) 10-1100 (1) (a) "Nudity" See obscen. definition 10-2105 (8)	Minors Nuisance "Injurious to morals..." Indecent... 10-101 "Injurious to public mor- als..." 10-105 Obscenity unjoined 10-1513 et seq. Injunction obscenity 10-2101 Nuisance: "Prostitu- tion, lewd- ness, assau- ltation or other inde- cent acts, or house of ill fame" 10-104	10-4001 31-503 31-604	Lowd cohab- itation 10-6004	10-6000 6000	10-6002 31-205	10-2101 Nuisance 10-104	

Minors to
mean defined:
" (1) The quality of any material or of any performance or of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or pseudo-scientific abuse, when it: (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (3) is clearly without redeeming social importance for minors. (2) The quality of any material or of any description or representation, in whatever form, which, as a whole, has the dominant effect of substantially arousing sexual desires in persons under the age of eighteen (18) years." 10-2105 (8)

10-5-10 et seq.	10-2700 et seq.	Lewd expo- sure: "Pub- lic indecen- cy..." in- cludes... (1) sexual in- tercourse... (2) device sexual in- tercourse... (3) lewd ex- posure of the body... (4) lewd fond- ling of the body... 10-11-9 Indec. lib- erties w/child 10-11-4 et seq.	Nudity (minors) 10-11-31 (b) (1) "Nudity" See obscen. defin. 10-11-20 (a)	Nuisance: "Lewdness, assauilication or prostitu- tion" 100 1/2-1 Passengers 114-87-49	10-11-7	10-11-8	10-11-2	10-11-11 10-11-10	10-11-14 et seq.	10-11-14 et seq. Nuisance 10-27-1 100 1/2-1
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...considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters..." 10-11-20 (b)

10-200 et seq.	Lewd matter 10-2003	Exposure: 10-2001	Nudity defined: 10-817 (b)	Nuisance: "Lewdness, assauilication or prostitu- tion" 9-270 et seq.	In presence of female: 10-2901 telephone 10-4944	10-4207	10-4207 4200	10-4221	10-4206	10-4220 et seq. Nuisance 9-2701
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...device, lewd, indecent, or lascivious..., instrument or article of indecent or immoral use..." 10-2903

OBSCENITY	LEWITNESS	INDICENCY (Indec. Ex.)	NUDITY	MORAL NUITANCE	OBSCENE LANGUAGE	ADULTERY	FORNICA- TION	SODOMY	UNCERT	PROFEN- TION
725.3 at seq.	725.1 at seq.	Exposure 725.1		Witnesses "...inde- cent..." 687.1	Profane and indecent 725.1	702.1	vicious... obhabita- tion 725.1	705.1, .2	704.1	714.1 at seq.
Minors 725.6	Lewd act in presence of child involving nude of childhood 725.3, .3									

Obscene defined: "...obscene, indecent, immoral, or impure... which would tend to the corruption of the morals of youth or others..." 725.1 (lewd, play, exhibition, show or entertainment) . "...obscene, lewd, indecent, lascivious, or filthy... or article of indecent or immoral use..." 725.5 (book, pamphlet, picture, writing or instrument).

					LOUISIANA					
21-3301	Lewd and lascivious behavior; "sexual in- tercourse... being viewed ...or the ex- posure of a sex organ..." 21-3306	Exposure: 21-3506	See obscen. definition 21-4301 (X) (a)	"Endangers ...public health" 21-4113	In films 51-112 (prescribed 1970) telephone 21-4113	21-3307	21-309 23-128 (repeated)	21-3305 aggravated sodomy 21-3506	21-3302	21-301 at seq.
Minors 21-3301 a										

Obscene defined: "...considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sodomy or masochism, and the material is patently offensive and utterly without redeeming social value..." 21-4301 (X) (a)

					KENTUCKY					
436.090 at seq.	436.075	Exposure lacking guile 436.148	"Nudity" See ob- scenity definition 436.101 (c)	Exposition, obscene matter 436.570	96.170 telephone 436.107 swearing profane cursing 431.000 436.150 train 377.260 437.000	436.070	436.070	Sodomy buggery 436.060	436.060	436.075 Witnesses 381.001
Minors 436.101 (2) at seq. and 436.540 at seq. Public feature crime 436.130	Exhibiting stockings, jock or ball 436.170	Indecent practices 435.103 (prescribed 1970)								
See offenses against mar- italty"										
Illicit con- tent in comic books 436.540 at seq.										

Obscene defined: "...to the average person, applying contemporary standards, the predominant appeal of the matter taken as a whole, is a prurient interest, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters." 436.101 (c)

					LOUISIANA Civil Human law State					
14.100	Disorderly conduct 14:93	Contrib. to delinquency "place where sexually indecent and obscene mat- erial... is offered... or exhibited" 14:93	Nudity defined: 14:92.2 A (2)	Obscenity, nuisance "recognition, prostitution or obscenity" 13:471	14:93 telephone 14:285 45:1160 Language or gestures 14:383	(indexed under other topics)	14:89	14:78	14:82 at seq.	
Minors 14:91.11 14:93.2	Exhib. of minors 23:251									
Pro-emption of regula- tion 14:92.3		Indecent behavior 14:88 Public nudity 14:281 at seq.								

Obscene defined:
(1) Exposure of one's person in a public place... that sex organ may be seen... by another... with the intent of arousing sexual desire.
(2) Production (of matter)... with the intent to primarily appeal to the prurient interest... of any lewd, lascivious, filthy or sexually indecent (matter)... (4)... any lewd, lascivious, sexually indecent dancing, lewd, lascivious or sexually indecent posing, lewd, lascivious or sexually indecent body movement..." 14:306 A

MINORITY	LEWENESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE MAINT.	ADULTERY	FORNICA- TION	SODOMY	INCEST	PROSTITU- TION
1-1961 1-1962	17-3441	17-301	Nudity defined: 17-440	Nuisance: "Placard re- sented to for lewdness" 17-3741	Indecent language profanity and offensive language 17-453	17-101	17-3543	17-3001	17-3581	17-3051
Obscene defined: "...illustrations of ...sadism, masochism, sexual perversion, hostility or lust, or obscenity, indecency immorality..." 17-2901										

					MARYLAND					
4-1 1-1961	Defined 27-16	Indecent exposure 27-123	Nudity proscribed and defined 27-416 A-G	Injection obscenity; circus etc. and equity etc. 27-418 A	Profanely cursing in streets 27-121	for divorce 16-34	Abduction for fornic. 27-1	27-553 554	27-335 390 381	27-1 et seq. 27-135 429 429 431 575
1-1961			Nudity and sexual displays 27-416A		Blasphemy 57-12					
1-1961					telephone 27-555A					

Obscene: "...obscene..." 17-410 (held to give adequate warning of the conduct proscribed and to mark boundaries sufficiently distinct for judges and jury to administer the law. Levin v. State, 1 Md. App. 139, 238 A. 2d 487 (1967).)

					MASSACHUSETTS					
1-1961 1-1961	General Entertain- ments 17-280 17-280	Indecent Exposure 272-53	Nudity: See obscen- ity defini- tion 272-28 (par. 3)	Obscenity, petition in equity 272-18C	Profane obscene impure language 272-31	272-54 et seq.	272-18 et seq.	272-34	272-17	272-53 et seq. Nuisance 159-4
1-1961	Devices for indecent purposes 272-31			Nuisance "prostitu- tion, assti- nation or lewdness" 159-4	Blasphemy 272-36			Unnatural and lasciv- ious acts 272-35 35A 277-45		
1-1961	...or tending to corrupt morals of youth..." 272-32 31				Obscene language at sporting event 272-36A					
1-1961	Unnatural and lasciv- ious act 272-35				Arrest for using 272-59					
1-1961	Low and lascivious persons 272-53				telephone 269-14A					
"...obscene, indecent or impure..." 272-28A										

Obscene to
here defined: "...obscene, indecent or impure, harmful to minors, or manifestly tends to corrupt the morals of youth..." "...harmful
to minors (harmful) ...representation of nudity, sexual conduct or sexual excitement which appeals predominantly to the prurient, shameful
and morbid interest of minors under sixteen years of age, is patently contrary to prevailing standards of adults in the community as to
harmful material for such minors, and is utterly without redeeming social importance for such minors." 272-28

					MICHIGAN					
1-1961 1-1961	Gross lewdness and lasciv- ious be- havior 28.567	Exposure 28.567 (1) City power 5.1740	Nudest compa. tax ation 2.555 (3a)	Village powers 5.1284 5.1332	Indecent language in presence of women and children Nuisances: 28.569	28.218 219	Lewd and lascivious cohabitation 28.567	28.355 356	28.545	28.131 345 (3) 400 703 717 1785 1865
1-1961	Sexual immorality 28.596	Gross indecency 28.578 (1)			"Lewdness, exhibition, prostitution, gambling, prostitutes, disorderly persons, (illegal) narcotic drugs, (illegal) liquor..." 27A.2801					Nuisance 27A.2801
1-1961	Exhibition of children 28.335				Obscenity Injection: "...obscene, lewd, lascivious, filthy, indecent, or disgusting, or...instrument of indecent or immoral use..." 27A.2938					

Terms defined: 1. "...obscene, lewd, lascivious, filthy or indecent, satiric or masochistic..."; 2. Test to be applied: "...the effect
of the (activity)...considered as a whole...upon the over age person in the community...judged...by the standards of common conscience
of the community of the contemporary period of the violation charged;" 3. "...prevalence...of illicit sex, or sexual relations, of perversion,
or sexual passion..." 1.28.575 (1); 2. 28.575 (2); 3. 28.575 (3)

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL SURVEILLANCE	OBSCENE LANGUAGE	ADULTERY	FORNICA- TION	SOBRIETY	INCEST	PROFANE
617.341 at seq. Minors 617.393 Village power to restrain 617.321	gross lewd- ness and lascivious behavior 617.33	Lewd ex- posure 617.33 Indecent exposure 617.35 ...331	Nudity defined 617.391 (3) Nudity (minors) 617.393 (b)	Obscenity: Village power to restrain and punish 617.321 Obscenity Public Nuisance 606.74	MINNESOTA Language prosecutive of assault 615.15 telephone 614.75	617.15 (repealed)	617.16 (repealed)	609.393 Hostility 609.394	617.13	617.36 at seq. repealed
Obscenity is harmful to minors; urgent need to prevent commercial exposure. 617.391 (b)(3)-(5)										
Minors pro- hibit visiting cafeteria, food. 617.397										

Obscenity defined: "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests." 617.341

II-2674-II at seq. Maximum penalties and dispatch II-2674-10 Supplied II-2674-10 equity rules in procedure II-2674-09 Scholar presumption 2674-15	Public or lack in public view II-2381	"private parts" ex- posure II-2390 Obscene indecent images substitution II-2380	Nuisance "lewdness, assignment or prostitu- tion" II-2666 Obscenity injoined II-2674-10 Obscenity action in Chancery of II-2674-04 rules of civil procedure per- taining to equity cases are appli- cable II-2674-08	MINNESOTA "Profanely scurrilous or coarse... vulgar and indecent language... II-2391 telephone II-2381.5	II-2998 at seq.	II-2998 at seq.	(not re- surrected)	II-437 439	II-231 at seq. Nuisance II-2666
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Obscene defined: "...to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole tends to prurient interest." 2674-01

563.270 at seq. Search and seizure 563.300 at seq. 563.360 Minors 563.310 Enjoined 563.295	563.430 563.150	Exposure to minors 563.100 Exposure 563.150	Obscenity enjoined 563.285	MINNESOTA Vulgar obscene or indecent pleadings in news- paper 563.390	563.190	563.230	Salmon 563.220	563.30 at seq. Nuisance "lewd- ness" 563.310
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Obscene defined: 1. "...devoted totally to...scandals, whorings, lechery, assignments, intrigues between men and women and immoral conduct of persons..." 563.270; 2. "...obscene, lewd, licentious, indecent or lascivious...or other publication of indecent, immoral or scandalous character...or publish in any newspaper any vulgar, scandalous, obscene or immoral pleadings or contents..." 563.280

94-3601 at seq. censure authorised 94-3604 94-3608	lewdness 94-3603	Indecent exposure: 94-3603 "private parts"	MONTANA Witness: "lewdness or offensive be- havior" 57-106 57-108 94-1006 at seq. 57-110 57-103 Nuisance: "lewdness, assignment, prostitution, gambling, (illegal) wine rooms, (illegal) narcotics, or other illegal acts prohibited by title 94 chapters 24 and 26." 94-1006	94-4107 94-4107	94-4109 94-4110	43-105 94-405	94-3601 at seq. Nuisance 94-3603
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Obscene defined: "...to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters." 94-3601

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUFRANCE	OBSCENE LANGUAGE	ADULTERY	FORNICA- TION	SODOMY	INCEST	PRO- STITUTION
NEW JERSEY										
2A:115-3 et seq.	Open lewd- ness or im- pudic act...	Exposure: 2A:115-1		Nuisance: "gather... for purpose of profiting therefrom" 2A:156-3 220 N.J.L. 1961	2A:140-3 Indecent com- munications to female 2A:115-4	2A:14-7 2A:29-1	2A:139-1	2A:143-1 -3	2A:154-1 et seq.	2A:115-1 et seq.
Pandering 2A:115-1.2	tending to debauch morale 2A:115-1	Indecency in publica- tion 2A:115-3		Municipal power 40:72-3						
To minors 2A:115-1.3 115-3.1				Obscenity injunction 2A:115-3.5						
Obscene comic books "... have factor in impeding the physical and mental development of our youth and constitute a clear and present dan- ger to the people of the State."				Nuisance: "prostitution, lewdness, or assignation"	misdemeanors 2A:133-1					
2A:115-3.3										
Prompt injunction 2A:115-3.6										

Obscenity:
1. Legislative findings: "The Legislature finds that the standards of obscenity now enunciated in chapter 115 of Title 2A of the New Jersey Statutes as amended and supplemented in recent years is unnecessarily permissive and a hindrance to effective legal action against obscene literature. The Legislature further finds that such unnecessary permissiveness has resulted from the incorporation into New Jersey Statutes of language from influential opinions authored by certain United States Supreme Court Justices; which language, however, does not represent binding majority decisions of the Supreme Court and, accordingly, need not bind the Legislature or the Judiciary of this State." 2A:115-1.1

2. Obscene defined: "...that which to the average person, applying contemporary community standards, when considered as a whole, taken its dominant theme or purpose an appeal to prurient interest." 2A:115-1.1

NEW MEXICO										
Power of municipal- ities to suppress 16-21-12 16-17-14	Expense 46A-9-8		Nuisance: "injurious to public... morals..." 46B-9-1		46B-10-2			46A-9-3	46A-10-3	46A-11-1 et seq.
NEW YORK										
Penal Code 235.06 et seq.	Indecent exhibitions Educ 2215-c	Nudity defined PC 235.30 (2)	Obscenity injunction CPLR 4350	Obscene postures or lang. Penal Code 240.30	Penal Code 255.17			Penal Code 130.00	Penal Code 255.15	Penal Code 235.06 et seq.
Stricter prosecutions PC 235.10 PC 235.22	At fairs or expositions Educ. and M 298		Obscenity town's power to prohibit Towns 136 (11)	Abusive or obscene language in public Penal 240.21						Penal Code 235.06 et seq.
to minors PC 235.30 PC 235.31	revocation of license for, vehicles and T. 594		Nuisance: "lewdness, assignation, or prostitution" Pub H 2335							Penal Code 235.06 et seq.
Motion Picture films Educ. 182-a	Indecency injunction Crim 53-a									Penal Code 235.06 et seq.
Seizure and forfeiture Penal 410.06										Penal Code 235.06 et seq.

(Obscenity
1. Constitution. (liberty of conscience not to exclude acts of licentiousness.) Const art 1, Sec. 3

2. Obscene defined: "... (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, or
exhibition, sodomy or masturbation, and (b) it goes substantially beyond customary limits of candor in describing or representing such matter,
and (c) it is utterly without redeeming social value." Penal Code 235.06

NORTH CAROLINA										
14-190.1 et seq.	Lewd women within three miles of colleges 14-190	Indecent exposure 14-190.9	(see Indecent Nuisances: "lewdness, assignation prostitution, gambling, or illegal sale of) whiskey or narcotic drugs" 14-191 et seq. Obscenity Injunction 14-190.2	Profane or indecent language 14-193 telephone 14-195 profane or obscene language on highways 14-197	14-194	14-194	14-177	14-178 179	14-178 179	14-178 179
to minors 14-190.7 190.8		Indecent exposure, immoral shows 14-190								14-178 179
Adversary proceedings 14-190.5 & injunction										14-178 179

Obscene defined: "... (1) The dominant theme of the material taken as a whole appeals to the prurient interest in sex; and, (2) the material is
intended to offend because it offends contemporary national community standards relating to the description or representation of sexual
matters; and, (3) the material is utterly without redeeming social value; and, (4) the material as used is not protected or privileged under
the Constitution of the United States or the Constitution of North Carolina." 14-190.1 (b)

[illegible]

OBSCENITY	LEWDSITY	INDICENCY (Index, Ind.)	NUDITY	MORAL TURPITUDE	OBSCENE LANGUAGE	ADULTERY	FORNICA- TION	SODOMY	INCEST	WHORE- DOM
21-1031 et seq.	Lewd defined "Immature, lecherous, disolute, debauched, savage, cal- umnious or pornographic"	Indecent exhibition or exposure "private parts" "such as is offensive to decency... or to morals ...lewd thoughts." 21-1031 (second)		Widowhood "...offensive decency..." 20-1 Immature 21-1337 Chastity Immature 21-1031	21-901 et seq. According obscene or indecent language, songs, etc. 21-1031 (4) Telephone 21-1173	21-6-71 et seq. Deception of adultery screen (Indiana.) 21-1040.51 21-1040.52	Showing sexual inter- course on outdoor screen (Indiana.) 21-1040.53	21-996 -507 Showing sexual population on outdoor screen 21-1040.53	21-996 et seq. 43-3 21-107	21-996 et seq.
display of sexual inter- course on outdoor screen prohibited 21-1040.51										

Obscene defined: 17. "...obscene filth, indecent, lecherous, lewd or unfit..." 21-1040.6; 1. "...to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 21-1040.12 (other well defined: filth, indecent, lecherous, and lewd 21-1040.12); 3. "(b) 'obscene literature'...any literature offensive to the decency of society, expressing or presenting to the mind or view something that purity and decency forbids to be exposed, or...would books which...are not uplifting and beneficial to the education, welfare, and character building of the children of Oklahoma." 21-1040.1 (a)

Obscene	Lewdness	Indecent	Widowhood	Obscene	Adultery	Fornication	Sodomy	Incest	Whore- dom
21-1031 et seq.	21-1031 et seq.	21-1031 et seq.	21-1031 et seq.	21-1031 et seq.	21-1031 et seq.	21-1031 et seq.	21-1031 et seq.	21-1031 et seq.	21-1031 et seq.

Obscene defined: "...G, considered as a whole, its predominant theme appeals to prurient interest, and if it is patently offensive and goes substantially beyond the customary limits of candor in describing or representing such matter with reference to ordinary persons." 17.11 (b)

Obscene	Lewdness	Indecent	Widowhood	Obscene	Adultery	Fornication	Sodomy	Incest	Whore- dom
21-1031 et seq.	21-1031 et seq.	21-1031 et seq.	21-1031 et seq.	21-1031 et seq.	21-1031 et seq.	21-1031 et seq.	21-1031 et seq.	21-1031 et seq.	21-1031 et seq.

Obscene defined: "...that which, to the average person applying contemporary community standards, has as its dominant theme, taken as a whole, an appeal to prurient interest." 18-4554

SECURITY	LOWNESS	INDUCENCY (Indec. Ex.)	NUDITY	MORAL NUITANCE	OBSCENE LANGUAGE	ADULTERY	FORNICA- TION	SODOMY	INCEST	PROSTITU- TION
ALABAMA										
11-1 sec.	Lowness nuisance 10-1-1	Promotion of obscene shows 11-21-14	Nude figures (minors) 11-21-14	Nuisance: "lowness, assignment, or prostitu- tion" 11-30-1	32-2-13 19	11-5-2	11-24-5	11-19-3	11-6-4	11-63-1
11-1-1 sec.	11-20-1	11-21-14	11-21-14	11-30-1	11-11-3		Incarnations fornication 11-5-6		15-1-1 et seq.	11-34-1 et seq.
11-1-1 sec.	"Low" sec obscenity definition 11-21-10	"Indecent" see obscenity definition 11-21-10		Advertising along high- way 14-10-12	10-3-1 et seq.					Pandering 11-34-5
11-1-1 sec.				Obecenity injunction 11-31-13						Nuisance 11-30-1

Secum defined: 1. "...obscene..." 11-31-1; 2. to minors; "...devoted to, or is principally made up of descriptions of illicit sex or sexual activity or which is obscene, low, lascivious, or indecent, or which consists of pictures of nude or partially dressed figures posed or assumed in a manner to provoke or arouse lust or passion or to exploit sex, lust or perversion..." or instrument of indecent or immoral use..." 11-10

SOUTH CAROLINA										
16-46 sec.	Nuisance 16-1001 et seq.	Indecent exposure 16-413		Nuisance: "lowness, assignment, or prostitu- tion" 10-1000	Obecene message to women 16-553	16-496 et seq.	16-496 16-499	16-417	16-493	16-469 et seq.
16-46 sec.	Reactive for purpose of lowness 16-699 (7)	Exhibiting indecent pictures 16-425		Nuisance "dangerous to human health" Vol. 17, §320	grounds for divorce 20-101		Disqualifies voter 23-62 92			Nuisance 16-1001
16-46 sec.				Obecenity injunction 16-416	16-553.1					

Secum defined: "...obscene, indecent or improper print (etc.)... manifestly tending to the corruption of the morals of youth..." 16-414

SOUTH DAKOTA										
22-21-17 sec.	Indecent exposure felony 22-24-1 et seq.		Municipal power to remove 9-20-13	Obecene language 22-11-7	22-21-17 19			13-1716	22-22-19 22-22-20	13-1717 et seq.
22-21-17 sec.	22-24-3.1		Zoning 11-3-7	Obecene or lascivious language in presence of women or children (also tele- phone) 22-24-6	Grounds for divorce 22-4-2				25-1-8	Nuisance 22-10-10
22-21-17 sec.	Outraging public decency and "injurious to public morals" 22-24-6								13-1715	
22-21-17 sec.	Promoting indecent exposure 22-24-2									

Singing, speaking obscene song, word, etc. 22-24-16

Secum defined: "(1) ...that which, by contemporary standards as hereinafter set forth, considered as a whole, has as its dominant theme or theme as appeal to prurient interest. (2) Prurient interest is defined as a shameful or morbid interest in nudity, sex or excretion, which is substantially beyond customary limits of candor in description or representation of such matters and which as a matter of state public policy is clearly without redeeming social importance." 22-24-11

OBSCENITY	LEWDNESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUBILITY	OBSCENE LANGUAGE	ADULTERY	FORNICA- TION	SODOMY	INCEST	PROMI- TUE
39-3001 et seq.		Municipal power to prohibit indecent exhibitions 9-301	Nudist colony forbidden 39-3000	Nuisance: "includes the laws of decency" 9-3001 2903 35 Tenn. app. 450	13-007 Obscene language 39-3001 39-3001 39-3001	13-3001	39-3001	39-707	39-706 706	39-3001 et seq.
to minors 39-1012 et seq.			Nudity defined 39-1011	Obscenity injunction 39-3005						
Injunction 39-3005										

Obscene defined: "...obscene language or obscene prints... manifestly tending to corrupt the morals..." 39-3001

					TELEPHONE					
Title 10 Penal Code PC 127 et seq.	Level witness in theater PC 115	Indecent exhibition PC 115	Nudity: sex defini- tion of prurient interest"	Common nuisances "drinking, gambling, prostitution"	Obscene language PC 474 3154 d-2	PC 489 500 491	PC 503 504	PC 534	PC 493 et seq.	Penal Code 130 et seq. 907 600 607 1179 et seq. 1121 a Nuisance 1444
Adversary hearing PC 127 (10)	Lewdness defined PC 607	Indecent exposure PC 535 G	PC 127 (10)	4644	Telephone PC 475					
Municipal regulation allowed PC 127 (13)		Exposure to infant PC 474 535a		Obscenity injunction PC 127 (13)						
Obscenity injunction PC 127 (13)		Indecent exhibitions, films PC 612								
Comic books PC 128		Exposure public grounds PC 661								

Obscene defined: "(a) ...material (a) the dominant theme of which, taken as a whole, appeals to a prurient interest; (b) which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters and (c) which is utterly without redeeming social value." (b) "Prurient interest" means a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters." title 10, Penal Code, § 127 (1) (b) (b) (b)

					ITINER					
76-39-5 et seq.	Open and gross lewd- ness; asso- ciating in lewd or las- civious or obscene manner 76-39-1(1)	Indecent exposure (includes.) 76-39-5 76-39-13	Nudity: sex defini- tion of obscenity: 76-39-11	Nuisance: "...indecent or offensive to senses..." 76-39-1	Bingo, bal- led, or other lewd or obscene words in public place 76-39-5(3) 76-39-13	76-39-3	76-39-5 (includes.)	76-39-22	76-39-4	76-39-11 et seq. 76-39-11 76-39-11 76-39-11 76-39-11 City pass to register 39-39-11 Nuisance 47-1-1
seizure 76-39-7										
Injunction 76-39-10										
Obscenity to minors 76-39-5 (1)										
Hard-core pornography to minors 76-39-5 (8)										
Constructive knowledge 76-39-6										
Local regu- lation author- ized 76-39-15										

Obscene defined: "...whether to the average person, applying contemporary community standards, the dominant theme of the material or the conduct taken as a whole appeals to the prurient interest... Prurient interest shall mean a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and to matter which is utterly without redeeming social importance." 76-39-11

COMMUNITY	LEWDENESS	INDECENCY (Indec. Ex.)	NUDITY	MORAL NUISANCE	OBSCENE LANGUAGE	ADULTERY	FORNICA- TION	SODOMY	SNECIST	PROSTITU- TION
<u>VERMONT</u>										
13-3801 et seq.	open and gross lewd- ness 13-3801	Exhibiting obscene, lewd or indecent picture...or presents in- decient or immoral show 13-2801		Power of Municipali- ties 34-211		13-311 202 299		Fellation 13-2603 2604		13-2631 13-2632 House of 131 fame 13-2604
to minors 13-3804 et seq.										
Obscene motion pictures 13-1801										
Charges defined: "...lewd or indecent...or which tends to the corruption of the morals of youth..." 13-2801										
<u>VIRGINIA</u>										
18.1-217 et seq.		Indecent exposure 18.1-214 18.1-215 to Child 18.1-214	Nudity; see obscen- ity definiti- 18.1-217 Tennis Displays 27-416 A-G	Obscenity injunction 18.1-214.3 Municipal Power 18.5	Swearing 18.1-237 et seq. Telephone 18.1-238	18.1-187	18.1-188 Cohabitation, 18.1-193	?	18.1-191	18.1-194 et seq.
May be enjoined 18.1-218.3										
Charges defined: "...that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters." 18.1-227										
<u>WASHINGTON</u>										
9.68.000 et seq.	Lewdness 9.79.120	Indecent exposure 9.79.080 9.79.120		Nuisance; "offend public decency" 9.68.010	Indecent or vulgar language 9.68.040 in public conveyances 9.27.030 telephone 9.61.230	9.79.110 120	False charge of 4.24.120	9.79.100	9.79.090	9.79.10 Nuisance 7.48.050
"Erotic material" defined 9.68.40.37.130 60	Sale of lewd publication defined 9.68.40.37.130 60	Indecent exposure 9.68.020		Nuisances; "lewdness, assignation, or prostitu- tion" 7.48.050						
Placing "adults only" label 9.61.060 et seq.	Injunction 7.42.090			Obscenity injunction 7.42.010 et seq.						
Comic books 7.42.010 et seq.										
Charges defined: 1. "Erotic Material": "...material... the dominant theme of which taken as a whole appeals to the prurient interest of youth in sex; which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters or sado-masochistic abuse; and is utterly without redeeming social value;..." 9.68.050 (2); 2. "Prohibited publications": "...detailed account of ...rape, sexual knowledge, seduction, adultery, sodomy or other sexual crime...or (3) Any detailed statement of any evidence of indecent, obscene or immoral acts offered in any trial...or any...account of the actions of any public prostitute (except concerning public welfare)..." 9.68.020										
<u>WEST VIRGINIA</u>										
61-9-1 tending to corrupt youth 61-9-1	Lewd and lascivious cohabitation 61-9-4 open and gross lewd- ness	Indecent exposure 61-9-28 Immoral shows prohibited -fairs- 19-7-8		Equitable remedies in aid of chas- tity, moral- ity and de- cency; Article 9 61-9-1 et seq.	Profanity, obscene, indecent or vulgar language (6 telephone) 61-9-18 Profane swearing 61-9-15	61-9-3	61-9-3- Lewd and lascivious cohabitation 61-9-4-	Crimes against nature 61-9-13	61-9-12	61-9-5 et seq. Nuisance 61-9-1
Perpetrating publications 61-9-10 61-9-1	Nuisance; Lewdness 61-9-1			Nuisance; "lewdness, assignation, or prostitu- tion" 61-9-1						
Charges defined:										
"...obscene language...or description manifestly tending to corrupt the morals of youth...or public morals..." 61-9-11										

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A P P E N D I X C

TIME-MOTION STUDY OF MOTION PICTURE FILM

DEEP THROAT pp. C-2 thru C-29

Exhibited at

The New Plaza

N.Y. Av. & 14th St., N.W.

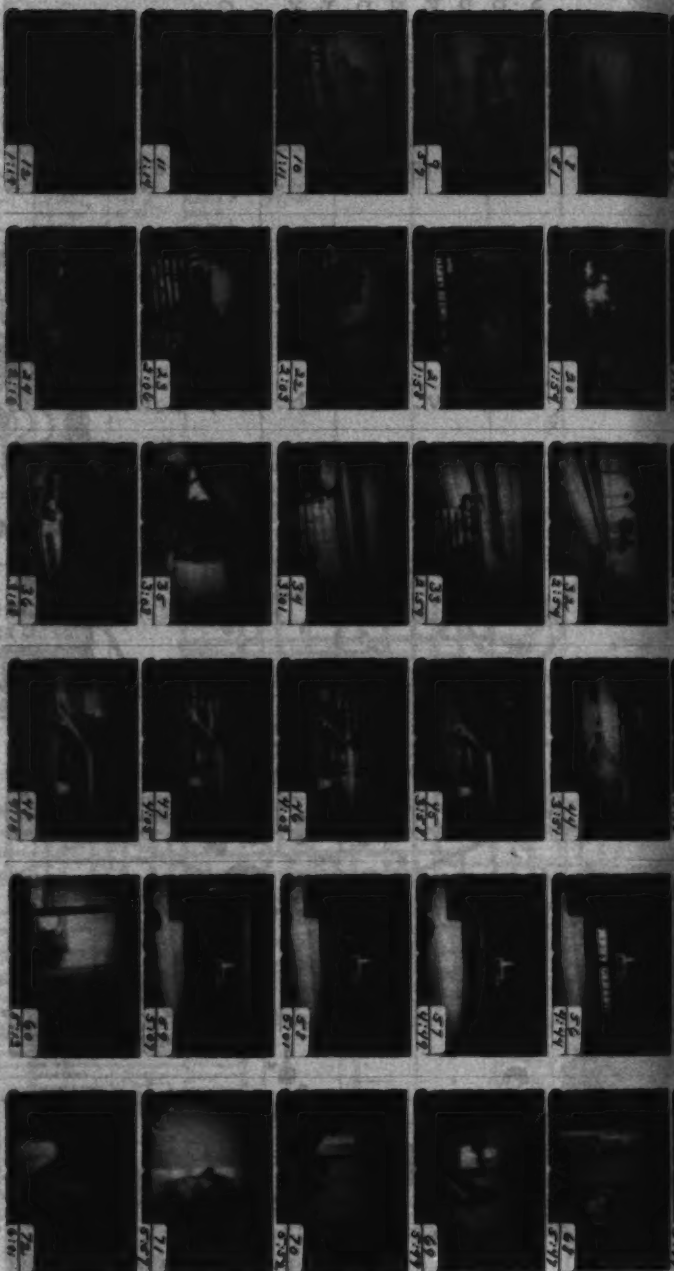
Washington, D.C.

Sept/Oct. 1972



O POINTS OF INTEREST

White House	32	House Office Bldg.	77
Capitol	33	Senate Office Bldg.	78
Supreme Court	34	Longworth	79
		House Office Bldg.	80
		Rayburn	81
		Senate Office Bldg.	82
		House Office Bldg.	83



"DEEP THROAT"

(Part 1 of 14 Parts)

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8/13

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8/17

37
8/18

49
8/18

61
8/18

4
8/1

DEEP
THROAT

14
8/13

26
8/17

37
8/18

50
8/18

64
8/18

3
8/1

DEEP
THROAT

15
8/13

27
8/17

39
8/18

51
8/18

66
8/18

4
8/1

DEEP
THROAT

16
8/13

28
8/17

40
8/18

52
8/18

67
8/18

5
8/1

DEEP
THROAT

17
8/13

29
8/17

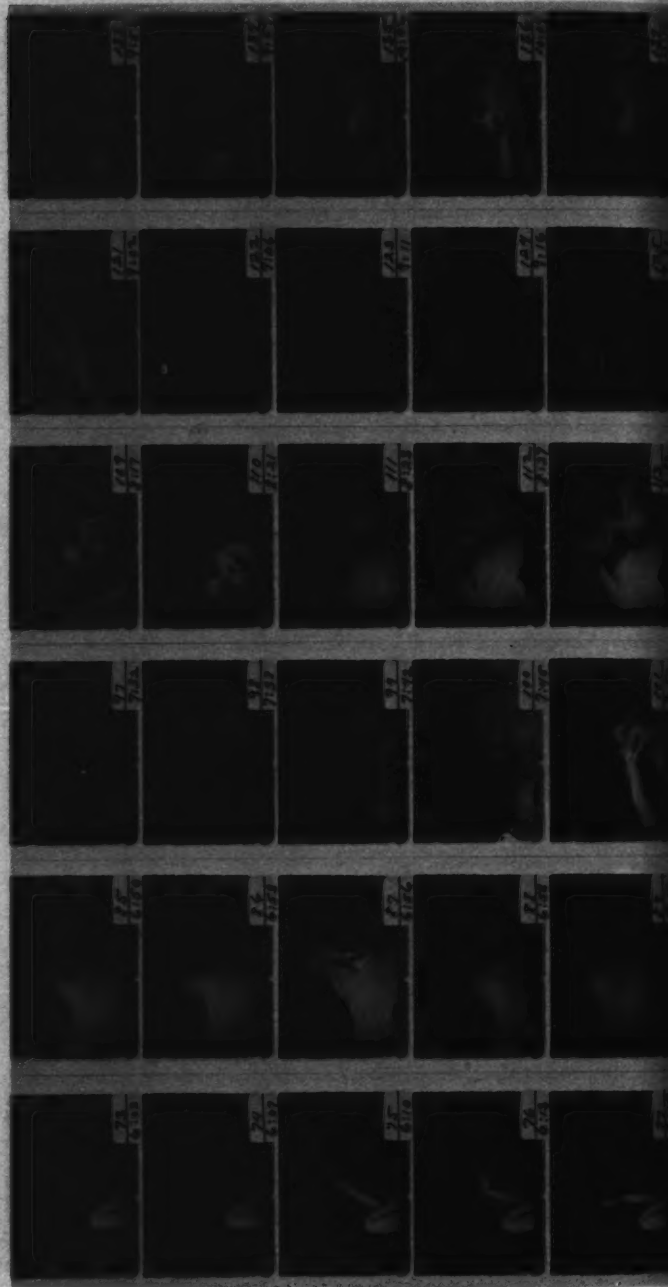
41
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53
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68
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"DEEP THROAT"

(Part 2 of 14 Parts)





(111-119) 100-119

"DEEP THROAT"

(Part 3 of 14 parts)





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"DEEP THROAT"

(Part 4 of 14 Parts)

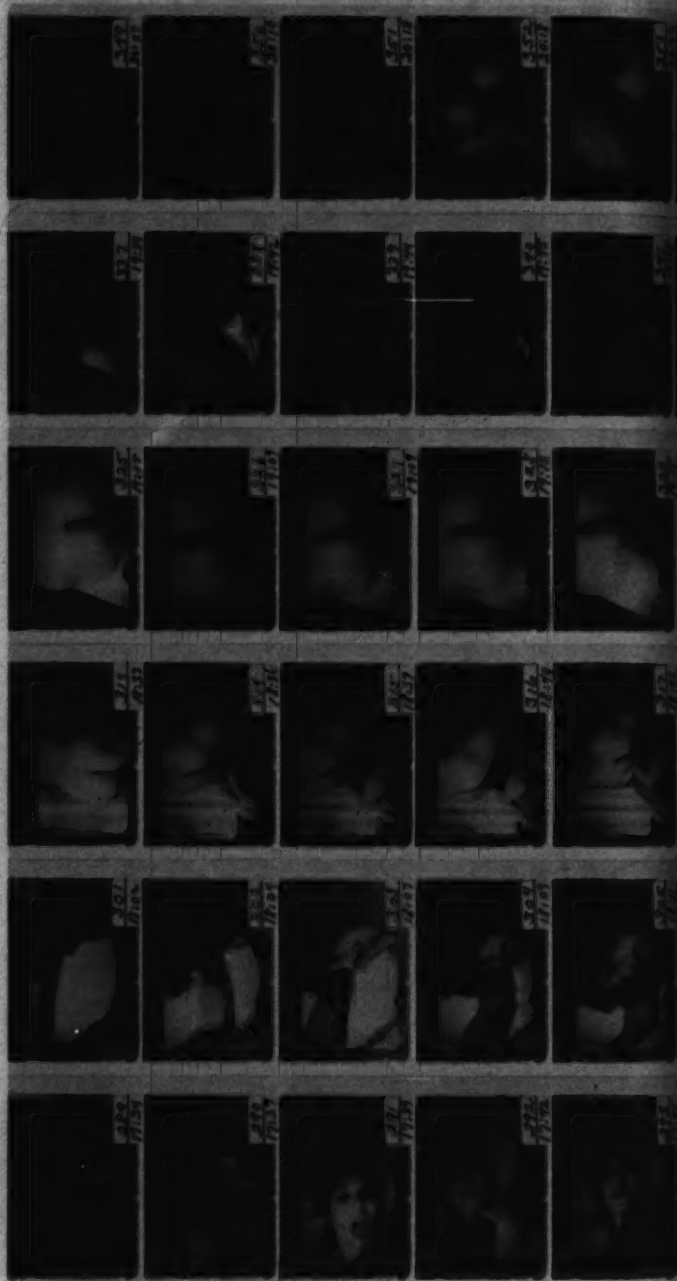




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"DEEP THROAT"

(Part 5 of 14 Parts)

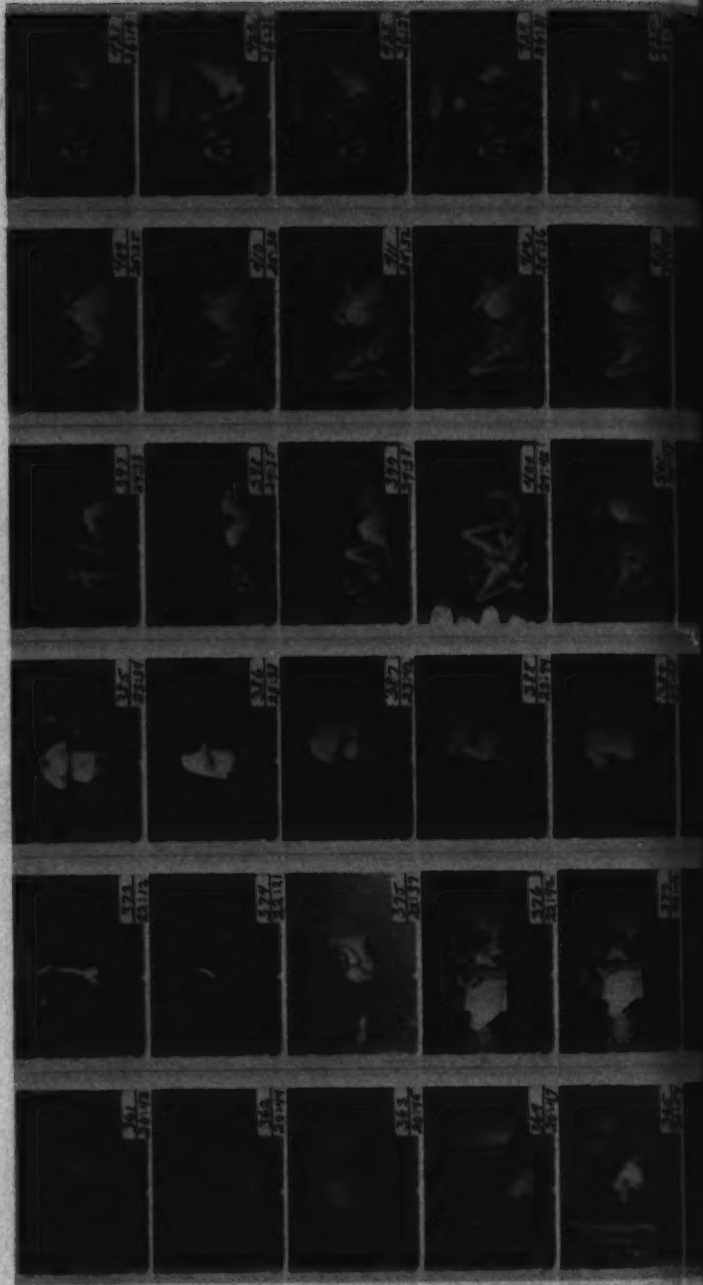


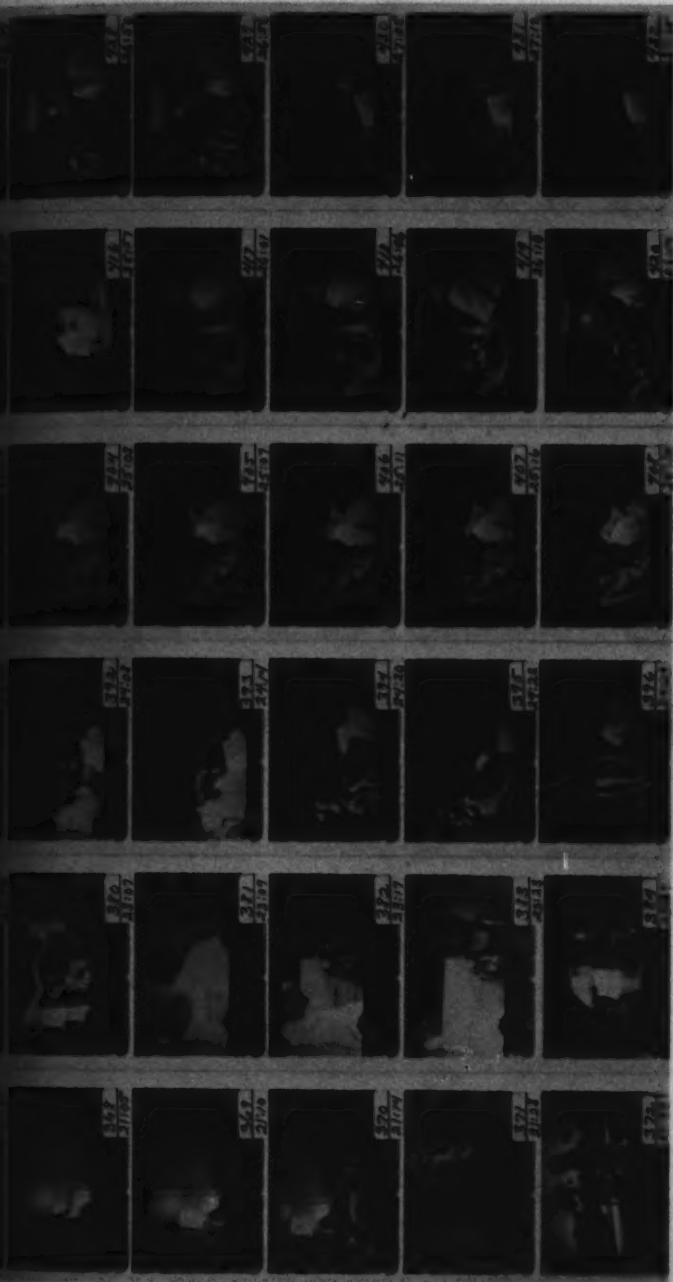


(1931-1932)

"DEEP THROAT"

(Part 6 of 14 Parts)



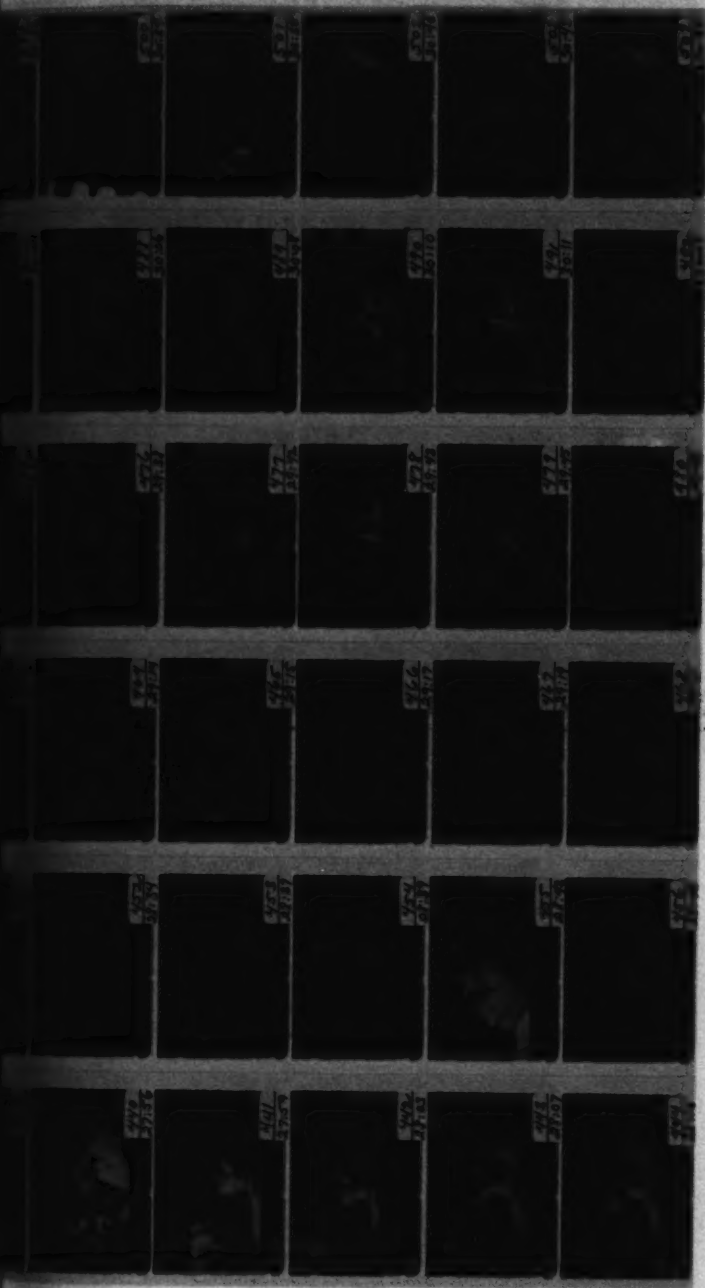


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"DEEP THROAT"

(Part 7 of 14 Parts)





(50-01-14-10000)

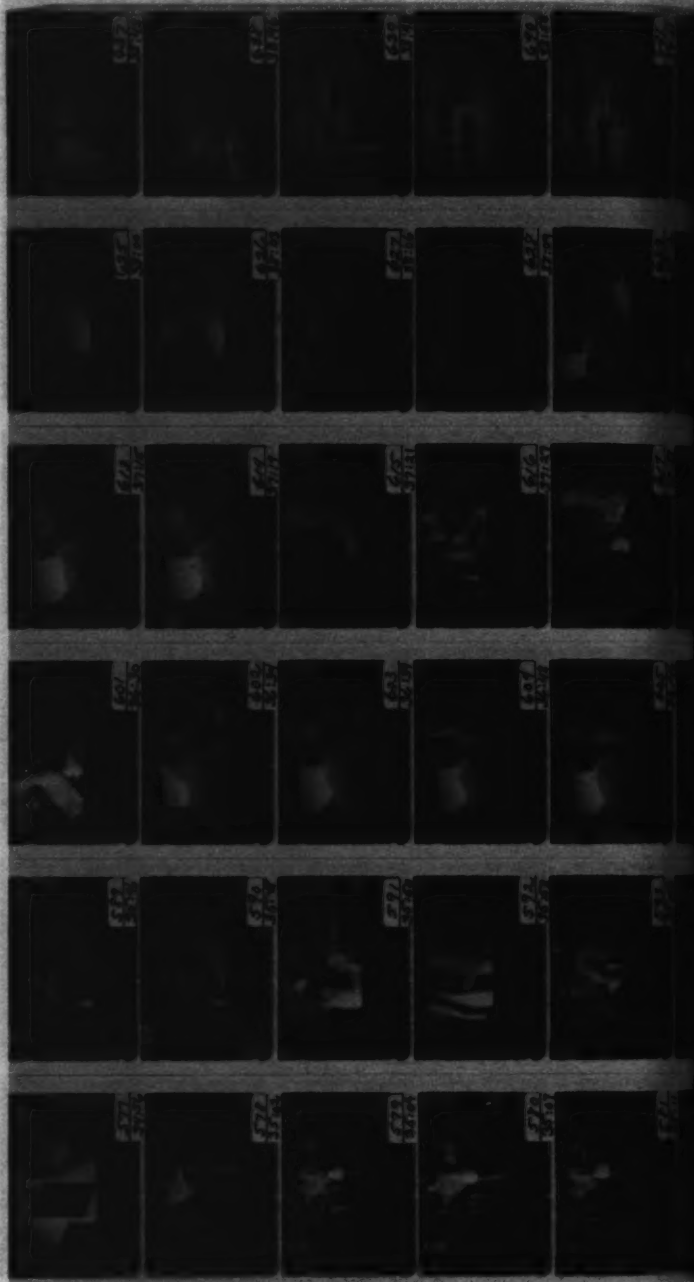
"DEEP THROAT"

(Part 8 of 14 Parts)



"DEEP THROAT"

(Part 9 of 14 parts)





"DEEP THROAT"

(part 10 of 14 parts)





"DEEP THROAT"

(Part 11 of 14 Parts)



C-23

(Box 15 of 17 boxes)

"DEEP THROAT"

(Part 12 of 14 Parts)



(b)(7)(C), (b)(7)(D)

"DEEP THROAT"

(Part 13 of 14 parts)

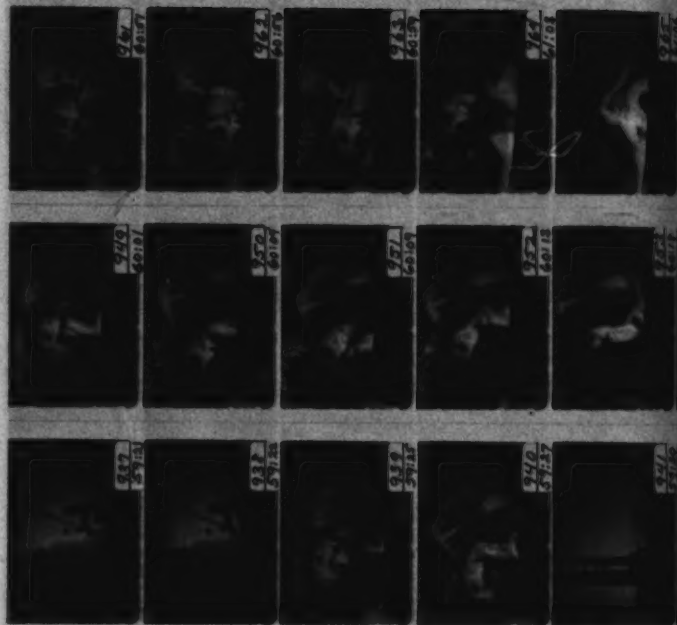


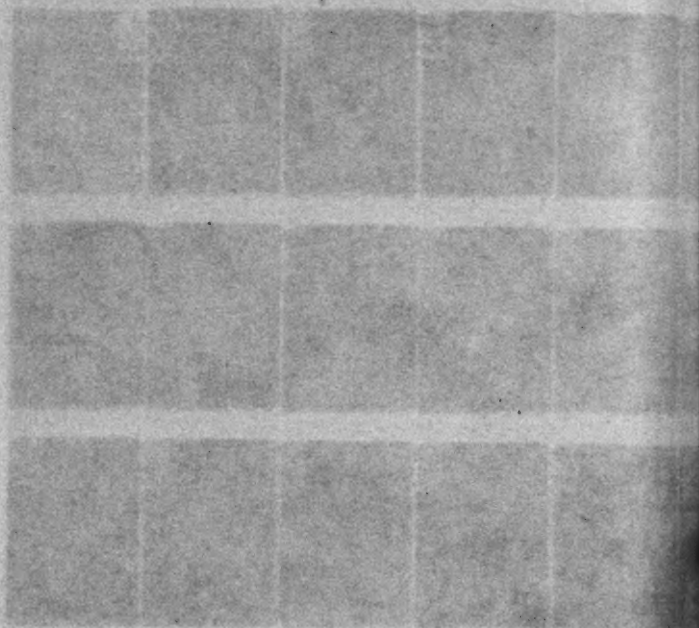


(Serial 19 of 14 Serials)

"DEEP THROAT"

(Part 14 of 14 Parts)





D-1

A P P E N D I X D

TIME-MOTION STUDY OF MOTION PICTURE FILM

SCHOOL GIRL pp. D-1 thru D-33

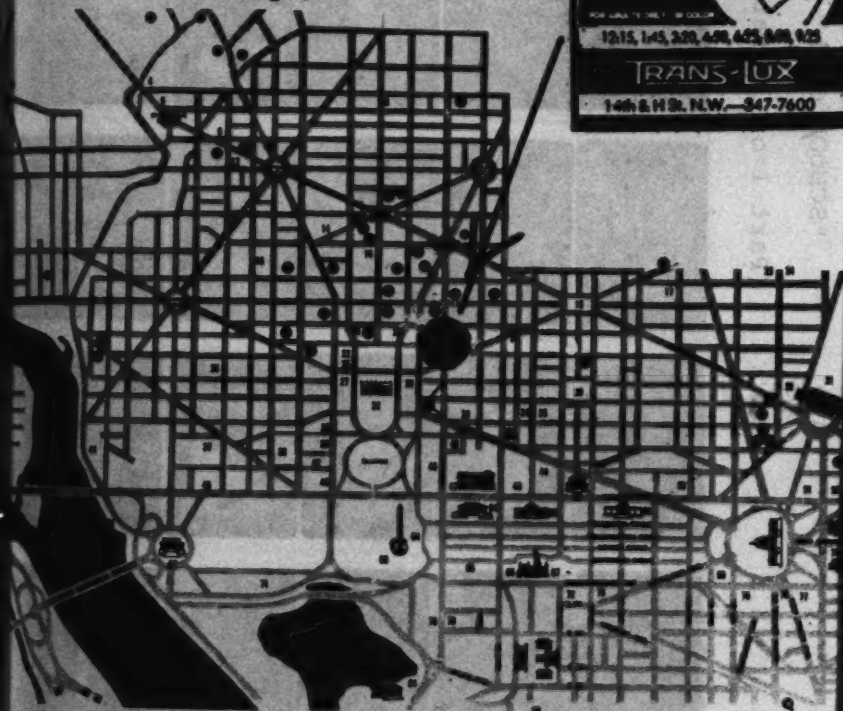
Exhibited at

Trans-Lux

14th & H St., N.W.

Washington, D.C.

Sept/Oct. 1972



O POINTS OF INTEREST

White House	50	Trans-Lux (14th & H St.)	77
Supreme Court	54	Capitol	78
		Library	79
		Trans-Lux (14th & H St.)	79
		Regiment	80
		Trans-Lux (14th & H St.)	81

SCHOOL GIRL

(Part 1 of 16 Parts)



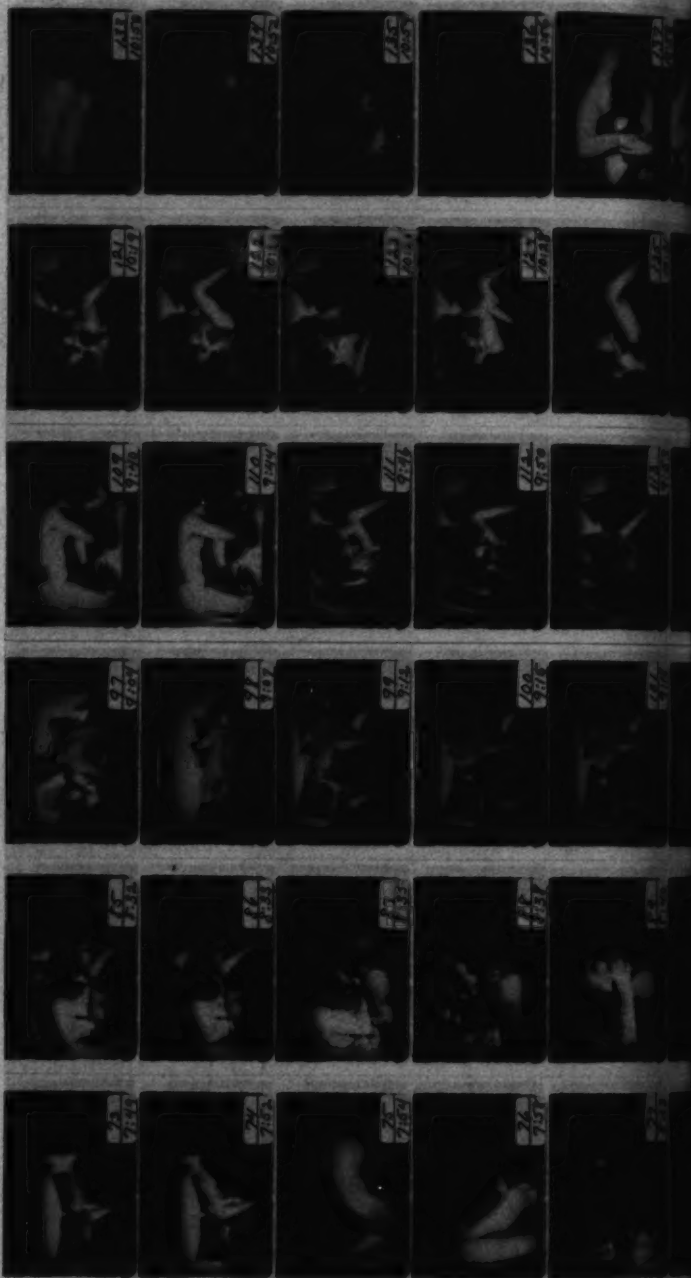


(B&W 3 of 14 frames)

PHOTOGRAPH

"SCHOOL GIRL"

(Part 2 of 16 Parts)





(Print 2 of 10 frames)

"SCHOOL GIRL"

(Part 3 of 16 Parts)



D-7



(KODAK SAFETY FILM)

EXHIBIT 101

"SCHOOL GIRL"

(Part 4 of 16 Parts)





REEL 2 OF 10

REEL 2 OF 10

"SCHOOL GIRL"

(Part 5 of 16 Parts)





"SCHOOL GIRL"

(Part 6 of 16 Parts)





"SCHOOL GIRL"

(Part 7 of 16 Parts)





REPRODUCED FROM
ORIGINAL COPY

"SCHOOL GIRL"

(Part 8 of 16 Parts)

D-16





LEWIS & CLARK

1804-1806

"SCHOOL GIRL"

(Part 9 of 16 parts)

D-18





(SEEK TO OF TO MATHS)

SCHOOL GIST.

"SCHOOL GIRL"

(Part 10 of 16 Parts)

D-20





(BEST IT OF RE BRACK)

ALVIN KROUSE

"SCHOOL GIRL"

(Part 11 of 16 Parts)





(This is of the same
subject as the one on the left)

(Part 12 of 16 Parts)





13012 17 OF 18 (1/27/68)

13012 17 OF 18 (1/27/68)

SCHOOL GIRL

(Part 13 of 16 Parts)





RECEIVED AT 10:00 PM 11/11/71

RECEIVED 11/11/71

(Part 14 of 16 Parts)





(Part 15 of 16 Parts)





"SCHOOL GIRL"

(Part 16 of 16 Parts)



D-34

D-33



E-1

A P P E N D I X E

TIME-MOTION STUDY OF MOTION PICTURE FILM

"STICKY SITUATION E-1 thru E-33

Exhibited at

Playhouse

15th & H St., N.W.

Washington, D.C.

Sept/Oct. 1972

She got herself into a...

**STICKY
SITUATION**

She became
sticky in the heart

IN COLOR ADULTS ONLY

12:30, 1:30, 3:10, 4:30
5:30, 7:10, 8:30, 9:50

PLAYHOUSE



○ POINTS OF INTEREST

White House	01	State Office Bldg.	77
Capitol	02	Senate Office Bldg.	78
Supreme Court	03	Longworth	79
		House Office Bldg.	80
		Reagan	81
		Senate Office Bldg. - Old	82
		Senate Office Bldg. - New	83

APPENDIX

FILM

"STICKY SITUATION"

(Part 1 of 15 Parts)



(104-3010-100)

"STICKY SITUATION"

(Part 2 of 15 Parts)





"STICKY SITUATION"

(Part 3 of 15 parts)

E-6





(Continued on E-8, E-9, E-10)

"STICKY SITUATION"
(Part 4 of 15 Parts)

E-8





(2016-2-12 10:50:10)

"STICKY SITUATION"

(Part 5 of 15 Parts)





UNIT 6 OF 12 (11/11)

"STICKY SITUATION"

(Part 6 of 15 parts)





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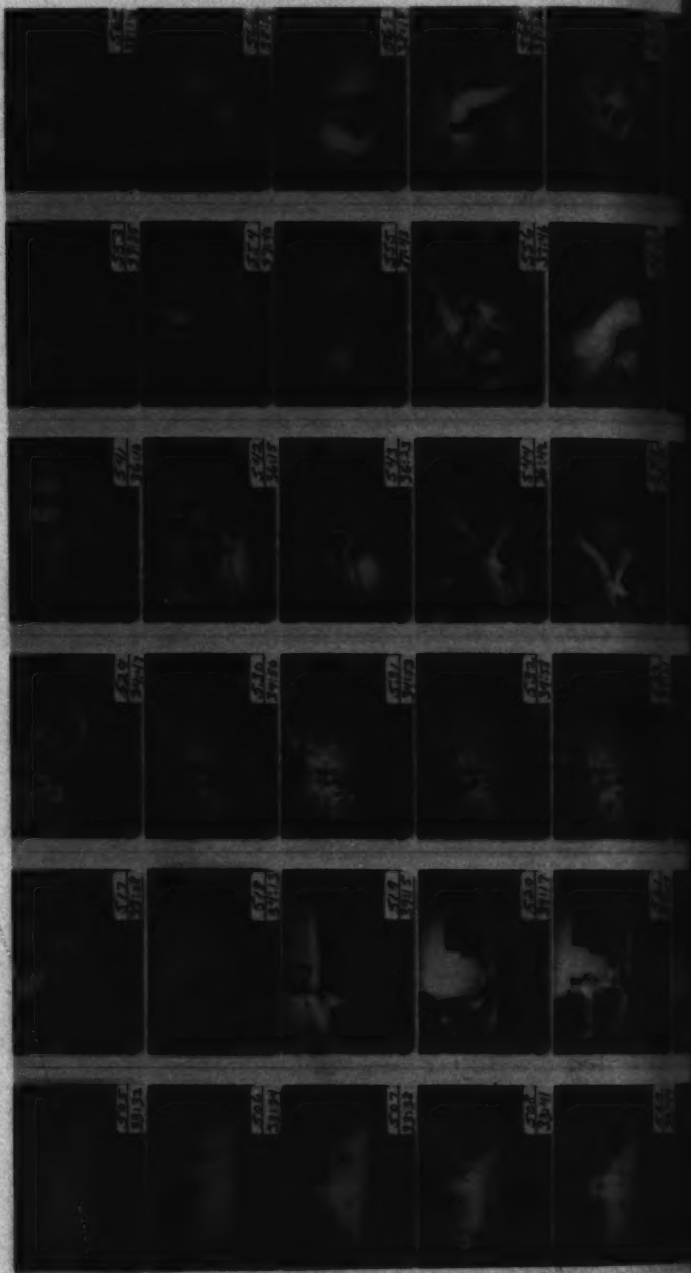
"STICKY SITUATION"

(part 7 of 15 parts)



"STICKY SITUATION"

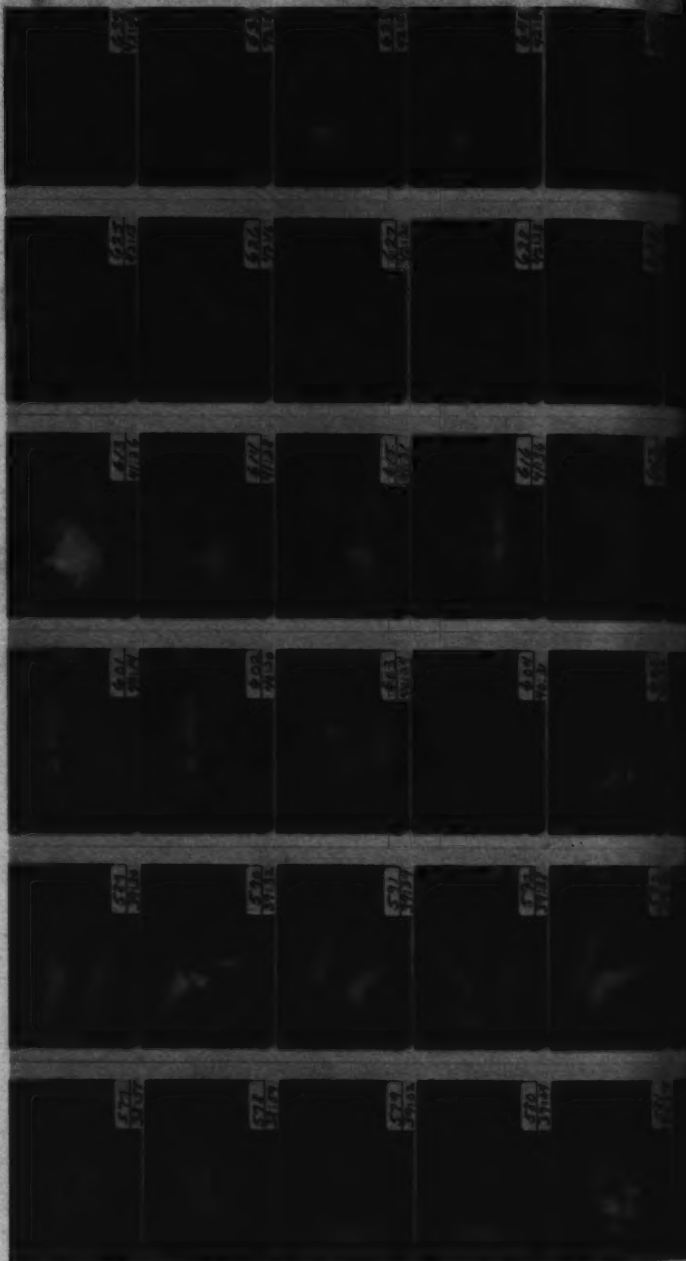
(Part 8 of 15 parts)

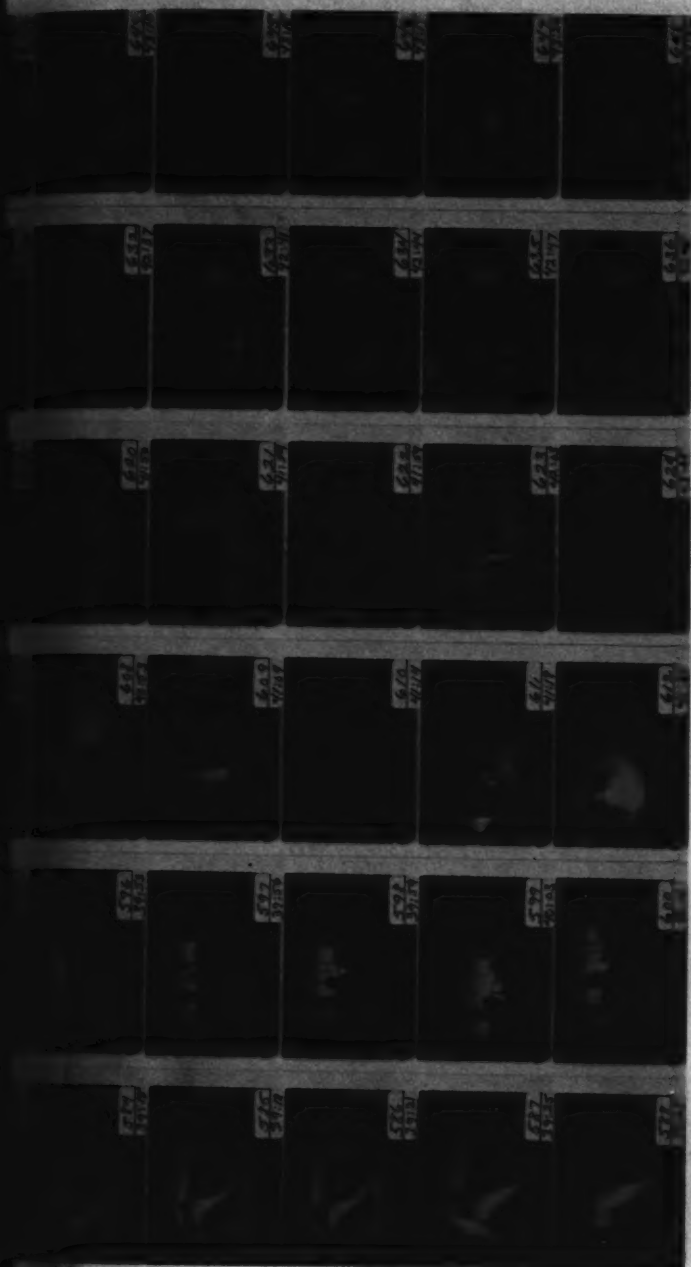




"STICKY SITUATION"

(Part 9 of 15 Parts)





"STICKY SITUATION"

(Part 10 of 15 parts)



REPRODUCED FROM THE ORIGINAL

"STICKY SITUATION"

(Part 11 of 15 Parts)

E-22

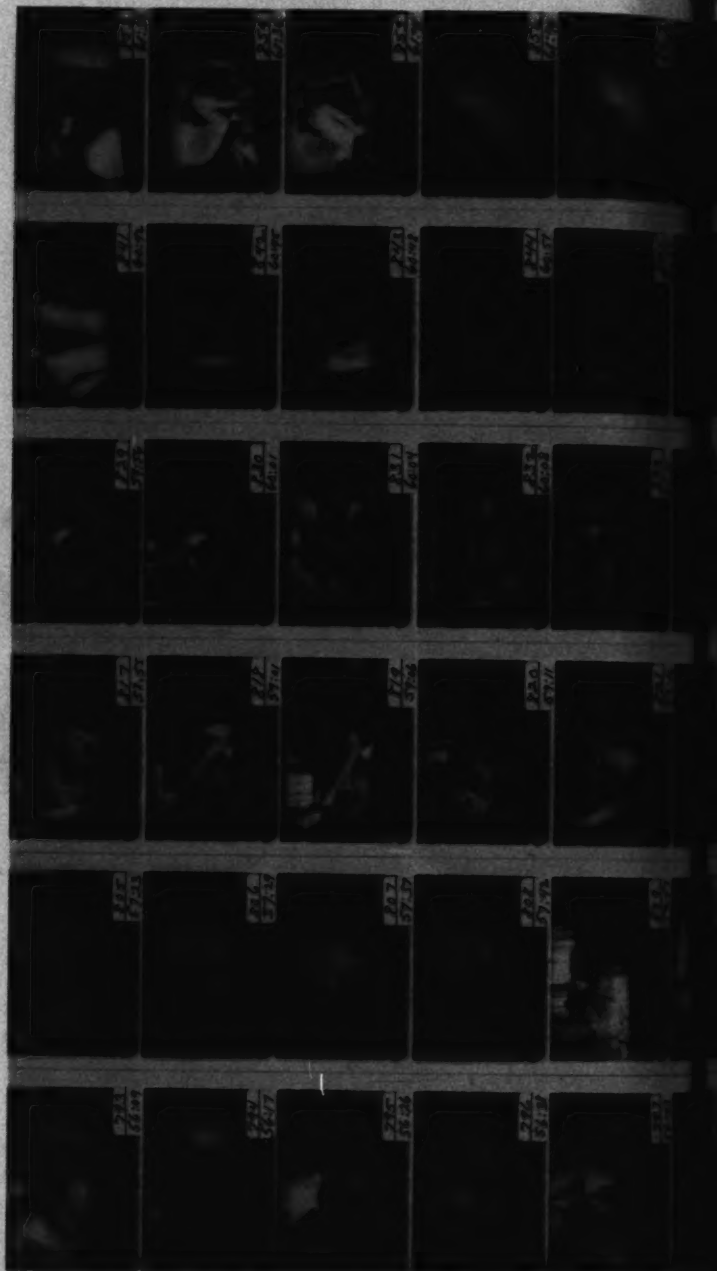




REPORT TO C. J. B. (1941)

"STICKY SITUATION"

(Part 12 of 15 Parts)





"STICKY SITUATION"

(Part 13 of 15 parts)





(UNCLASSIFIED)

"STICKY SITUATION"

(Part 14 of 15 Parts)



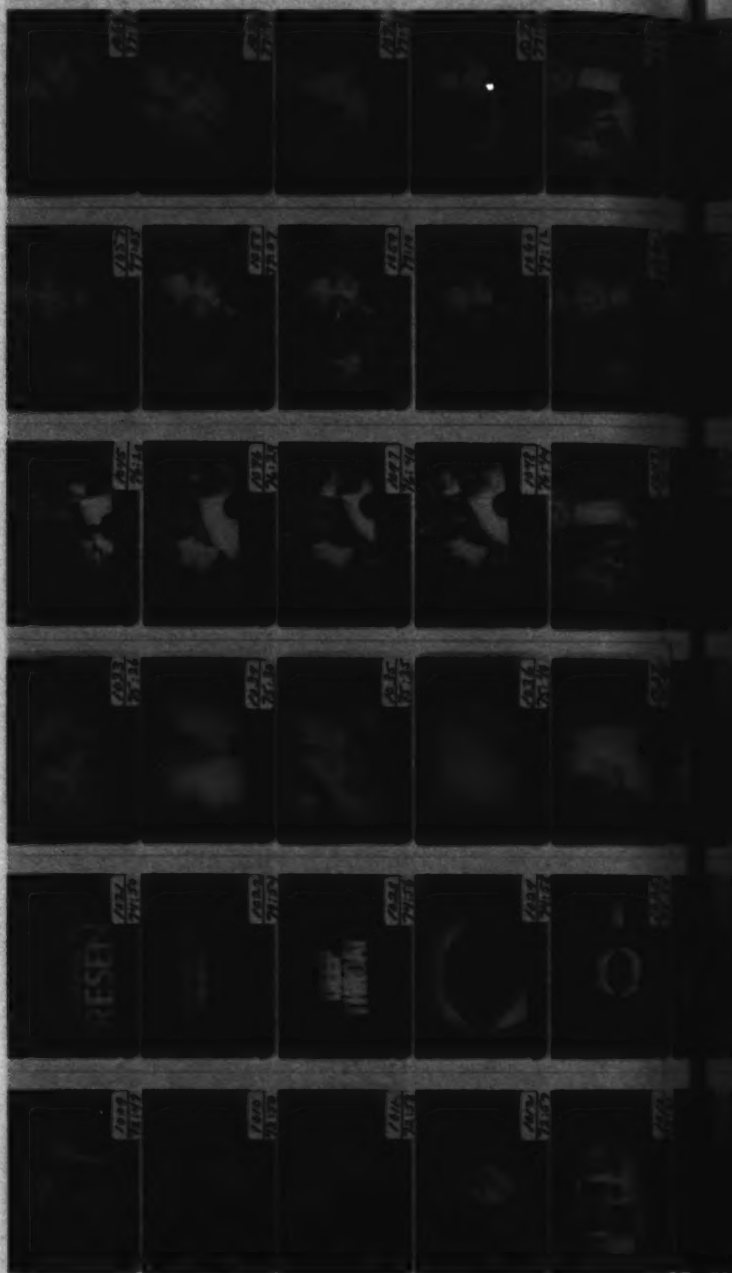


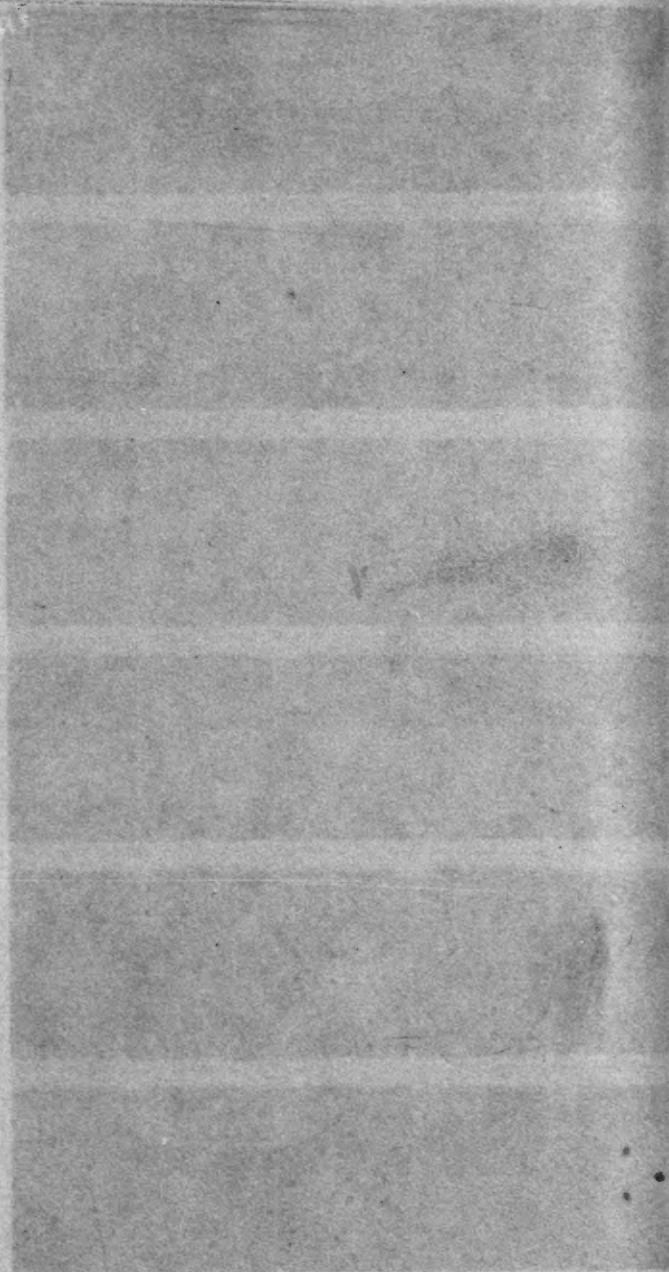
UNITED STATES GOVERNMENT

PHOTOGRAPHIC RESEARCH

"STICKY SITUATION"

(part 15 of 15 parts)





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APPENDIX F

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Washington Post Movie Ad of September 25, 1972	2
Los Angeles Times Movie Ad of October 7, 1972.	3
Photographs (3) of Paris Adult Theatre I & II	4
Portland, Oregon, Journal Article of August 8, 1972	5
Portland, Oregon, Journal Article of August 5, 1972	6
Los Angeles Times Movie Ad of September 29, 1972	7
Santa Monica Outlook Article on James R. Haskin, Executive Producer of "Magic Mirror".	8-11
Reviews on News Articles on "Deep Throat", "School Girl" and "Sticky Situation"	12 et seq

ABC, CBS Faked News, Says FCC

By WALTER WINSTON
Editorial in the News Item Group

WASHINGTON — Ten of the seven major radio and television networks were found to have faked news coverage of the Vietnam War, according to a report by the Federal Communications Commission.

The FCC's report, which was issued last week, said that the networks had faked news coverage of the Vietnam War in a variety of ways, including the use of fake news anchors and fake news stories.

The report also said that the networks had faked news coverage of the Vietnam War in a variety of ways, including the use of fake news anchors and fake news stories.

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UA UNITED ARTISTS

What a Party!
"Asylum" (MGM) at the Regency Theatre
L.A. Premiere at 8:30

"Asylum"

THE NEWEST OF THE NEW
A SAFE PLACE
A MUST SEE
A RARE CLASSIC - A TRUE
VIRAL / HUMAN EXPERIMENT

THE NEWEST OF THE NEW
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VIRAL / HUMAN EXPERIMENT

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THE NEWEST OF THE NEW
A SAFE PLACE
A MUST SEE
A RARE CLASSIC - A TRUE
VIRAL / HUMAN EXPERIMENT

Use of the Playhouse Square
Theater in the City
Theater in the City
Theater in the City

Anouilh's
Version of
Antigone

Use of the Playhouse Square
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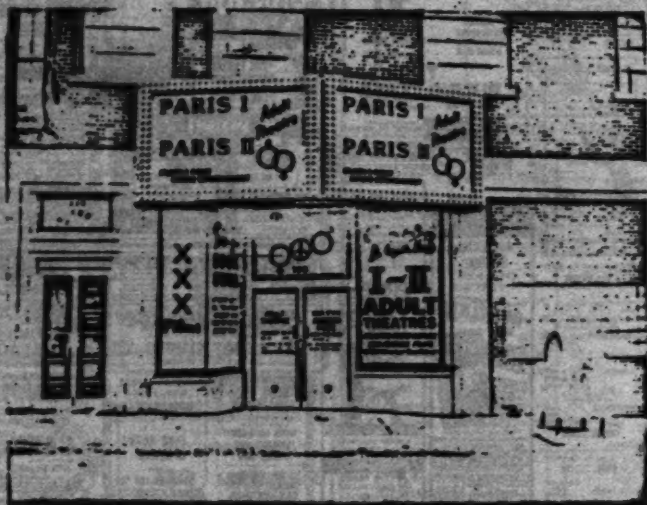
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Use of the Playhouse Square
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Theater in the City



Porno Sales Here, But Cartel Tied

By JAMES LONG
General Staff Writer

Portland's pornography industry is dominated by two main cartels with recent ties to the East.

The financial roots of one of the cartels stretched, at least, toward the New York crime syndicate.

THE STORY is sometimes told to follow. It involves a group of no fewer than two different corporations (not count) operating out of Oregon to the East.

The relationship of the different corporations presents a picture as confusing as the life in an Egyptian tomb. Though the two cartels are supposed to have different lines of ownership, they have had one another in the past through financial backing, at least one in the past, a mutual corporate interest.

The chief figure behind Portland's \$30-million-a-year business is Atlanta businessman Michael Thevis, 48.

LESS than a decade, he parlayed three small sex stores and one parlor into a multimillion-dollar international pornography empire involving several outlets in the East.

Source of finance for the business partnership (Jap) Hanna, a gambler and hoodlum who tried out, also had ties with a New York gangster.

At an interview last week with reporter Laraine of the Atlanta Journal, admitted that Hanna had loaned him money on several occasions. Thevis said he had the money back both

FIRST I didn't think about the fact that he was financially able to get a couple of loans," he said.

He always paid him back. In the days when there were no more loans. He only looked into it afterward and I didn't know what I found. So I got him out of our partnership and that was that."

Thevis said he kept in touch with Hanna, however, and that the gambler once referred him to a tax lawyer to handle some problems with the Internal Revenue Service.

On Nov. 17, 1970, Hanna's body, shot full of holes, was found in the trunk of his Cadillac in Miami.

THE MURDER never has been solved, but federal authorities believed it had something to do with the seizure of a shipment of pornography books in North Florida shortly before Hanna was killed.

Thevis, who had received loans from Hanna during their adult bookstore partnership days, was sufficiently well-heeled in 1966 to provide financial backing for Portland's other big pornography dealer, James R. Haskin of Los Angeles.

Haskin, owner of the Eros hardcore theater and bookstore chain, got started with the help of a "line of credit" establishment by Thevis. This was confirmed by Thevis in a 1971 interview in Los Angeles.

BOTH Haskins and Thevis at that time denied they were in business together, but an investigation of corporation records in Oregon, California, Missouri and Georgia shows that one of Thevis' top-ranking employees helped form Haskin's Eros Theater Corp. in Kansas City in 1970.

The employee, Robert Mitchum — not the Hollywood actor — is listed in Missouri as an incorporator of the Eros firm.

Mitchum also was the original president of Thevis' Cine-Matics Corp. in Atlanta, a maker of hardcore sex films, and is now listed as president of Northwest Theatres, Inc., operator of the Pussycat theaters and bookstores in Oregon.

Haskin was listed as president of Eros Theater Corp. in Missouri corporation papers listing Mitchum and Haskin's wife among the incorporators. Haskin is still listed as president of Eros, although Mitchum's name has since been dropped.

HASKIN's other firms include Ecktiographics Corp., a Nevada corporation with headquarters and two offices in Los Angeles; Eros Books, Inc., an Oregon corporation operating the Eros bookstores, and Oregon Bookmark, Inc.

Thevis' interests include Peachtree National Distributors, Global Leasing Corp., Cine-Matics, Pendulum Books, Johnny Reb news stands, Binkler Cigar Stand, Inc., Star Center, 106 Forsythe Corp., M.G.T. Corp., Metro Dance Club, Inc.; Transportation Center of Atlanta, Inc.; Automatic Enterprises, Book Bn, Inc., and Mini-Movies Inc.

Thevis could not be reached by the Oregon Journal for comment. Haskin returned a telephone call but refused to discuss the details of his various enterprises. He referred The Journal to an Atlanta lawyer, Robert E. Smith.

SMITH, one of the attorneys representing Thevis interests in the recent federal seizure of 1,500 allegedly obscene Danish magazines destined for Portland's Pussycat Bookstore, hung up the phone without talking.

A Journal tour of several pornography bookstores indicated that Haskin's wholesale outlet, Northwestern Distributors, handles a quantity of magazine titles listed in a recent issue of Thevis' Peachtree Discount Distributors catalog.

Besides supplying the Eros chain with pornography and plastic sex organ novelties, Northwest also is a source for apparently independent outlets such as the Portland-owned Ginger and Spice bookstore in Garden Home, Idaho.

Ginger Cardwell, a Ginger and Spice official, said the store has been stocked mainly through Northwest.

Portland, Oregon
Oregon Journal
(Cir. D 129,666)

AUG 8 - 1971

ALBANY P.C.R. 8th. 1971

Portland Porno Industry Earns Millions

by JAMES LONG
Staff Writer

Open sex laws have pornography a big business in Oregon.

According to some estimates, Portland area dealers will rake in \$20 million a year from avid public demand for "hardcore" sex films, movies and playthings.

Despite protestations of dealers that business is slumping, there is little evidence that expansion is slowing.

Not until the arrival on the local scene — but hardly a surprise — of the adult industry — is

old Edwin Leslie Lorden, known to his friends as "the Howard Stern of pornography."

Lorden, who began his career as a Los Angeles peep show impresario, weathered the back of an 18-month indeterminate sentence in Oregon prison to escape his present holdings to 250 "adult" theaters and porno shops from Texas to Alaska.

In January the portly tycoon established a movie production company in Portland. Panascope Productions help supply film for the empire.

Lorden could not be reached for an interview, but Journal spoke with his production manager, Nolder, 29, at Panascope headquarters in the town Portland Semler.

Lorden, part owner of the Theater in Portland (he owns the Lombard), Panascope has complete feature-length 35-millimeter "adult" films.

"The goal," he added, "is to put a feature film on every day. We also plan to make 20-minute shorts."

Lorden said Panascope has trouble finding actors and actresses for Portland-made sex epics. "Men are no problem," he smiled, pulling out a stack of 100 applications. "As for the chicks, I usually find one and she's the best."

Lorden said one applicant for a sex film role was the daughter of a local discount store owner. "I couldn't believe he was serious. I asked him if he'd be bashful addressing, and his reply was to scribble right in the spot."

Technical talent is no particular problem, either, Nolder said.

Dan Hoffman, a former KOIN-TV newsmen, was hired to film Panascope's "Westward Ho House," but dropped out before the picture was completed.

Hoffman told The Journal he quit "when they wanted to get down to filming the nitty-gritty." Nolder said Panascope backed out on Hoffman because filming costs were getting too high.

"An average picture costs \$8,000," Nolder said. "Westward Ho House was shot on location at Burns, and it ran up to \$10,000 or \$12,000. I would say \$8,000 would be an absolute minimum for making a film."

According to Nolder, a 35-millimeter hardcore film rents for as much as \$2,000 a week in Dallas or New York. "I don't know how much a picture earns, total," he said. "That's not my end of the business."

Dave Friedman, head of Entertainment Ventures, a Los Angeles film booking company, told The Journal he knows of "five or six" hardcore film producers making movies in Oregon to

avoid California's tougher sex laws.

"They were getting busted right on the set in Los Angeles," Friedman said. "California has an oral sodomy law, and that's what they were using."

He said the California caseload speeded up when hardcore film maker Tom Parker was convicted on sex charges involving children in one of his productions.

"Personally, I don't like hardcore," said Friedman, president of the Adult Film Association. "I'm a showman, and hardcore gives away the third act as soon as the curtain rises."

Despite his alleged personal dislike, Friedman says he books sex films for theater owners because they make money.

MOST OF these films, said Friedman, are low-budget affairs made on speculation or on order from big porno dealers.

"The average 16-millimeter hardcore producer spends \$2,500 to make his

film," said Friedman. "He sells 20 prints for \$20,000. So he runs \$2,500 up to \$20,000 and does this four or five times a year."

Friedman added, "But if he gets busted once, he can drop half his money on legal expenses."

Tracking down hardcore movie producers proved, for Journal reporters, comparable to a cross between a snipe hunt and an effort to interview the real Howard Hughes.

ONE PRODUCER who gave his name as "Bob Gilbert" was reached by telephone in Eugene, and offered a tryout to Journal staffer Or Hopkins. He did not know she was a reporter. He said the part would require nudity.

Later, Gilbert said he was shooting the film on order for a distributor he refused to name. "I do all kinds of films," explained Gilbert. "I do stock footage — a lot of legit stuff for CBS. This is just one more job."

Friedman commented, "I don't know why these guys are so furtive. I can't find them half the time myself. You run into mail drops, telephone numbers of go-betweens — all that kind of stuff. I keep calling them. If you're not doing anything illegal, why keep sneaking around?"

By latest count, 18 movie theaters in Portland show sex films of one kind or another on a regular basis.

The estimated "gross" is something just short of a quarter-million dollars a week.

AT PANASCOPE Nolder declared that audiences are getting tired of near-plotless footage of sexual intercourse and sodomy. "We're thinking about some horror plots," he said.

Nolder said Producer Lorden "insists on high standards" for Panascope films and "won't allow gay films, or films with animals and people, or mixed races."

He smiled, "I guess that's ethics, of sorts, for this business."

Portland, Ore.
Oregon Journal
(Cir. D 137/30)

AUG 5 - 1971

Allen's P.C.R. Inc.

Raves for Israel Orchestra

THE JACOBY ORCHESTRA, led by conductor and violinist Eyal Salomon, is the Israeli Philharmonic's first performance in Los Angeles. The orchestra, which has been touring the United States for several years, is the first to perform in Los Angeles since the 1970s.

Salomon, who conducts from his own seat, is a violinist and conductor. He has been conducting the orchestra since 1985. The orchestra has performed in many cities, including New York, Chicago, and San Francisco. It is the first Israeli orchestra to perform in Los Angeles.

The orchestra's repertoire includes works by Shostakovich, Tchaikovsky, and Mahler. It is the first Israeli orchestra to perform in Los Angeles. The orchestra's performance was a success, with many raves from the audience.

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UA UNITED ARTISTS
SNEAK PREVIEW
A GREAT BEAUTY OF A FILM



A GREAT BEAUTY OF A FILM
A GREAT BEAUTY OF A FILM
A GREAT BEAUTY OF A FILM

WHEN THE LEGENDS DIE



WHEN THE LEGENDS DIE
WHEN THE LEGENDS DIE
WHEN THE LEGENDS DIE

SLAUGHTER'S SLAYING 'EM ALL OVER TOWN!

Net many men take on the mob!
SLAUGHTER did... and a SLAUGHTER it was!
Jim Brown in SLAUGHTER!
JOHN BROWN, STELLA STEVENS, HIP HOP
DAN GORDON, BARBARA CLARK, CAMERON MITCHELL

13
HOLLERER ON THE ROOF
NOW IN ITS 3RD MONTH
NOW IN ITS 3RD MONTH
NOW IN ITS 3RD MONTH

THUNDERHEADS
LAS PULS
LAS PULS

NOW PLAYING!
AT A THEATRE ON
DOWNTOWN
NOW PLAYING!
AT A THEATRE ON
DOWNTOWN

IF YOU'RE A GUY WATCHER
YOU'LL LOVE WATCHING THIS
COMPLETE 1st RUN
IF YOU'RE A GUY WATCHER
YOU'LL LOVE WATCHING THIS

Evening Outlook Probe-7

Boy Man Finds Business Rewarding

His food habits at Union High School in San Francisco are much more than a hobby for a 15-year-old boy named James H. Hudson Jr. He is a "hard-core" business man, and he is not alone. He is one of a group of boys who are finding business rewarding.

A study made six weeks ago by the San Francisco Chronicle showed that 15 percent of the boys in the city are "hard-core" business men. They are boys who are not only interested in business but who are actually engaged in it.

By R. B. FINE
James H. Hudson Jr. is a 15-year-old boy who is a "hard-core" business man. He is one of a group of boys who are finding business rewarding.

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Evening Outlook Probe-3

Sex Movie 'Empire' Bared

It was only through the efforts of a group of boys who are finding business rewarding that the sex movie "Empire" was bared. The movie is a hard-core business man.

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Evening Outlook Probe-5

'Hard-Core' Talent Agents Uncovered

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Evening Outlook Probe-3

Outside Of 'Reb's'

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Deep Throat (COLOR)

Hardcore hetero sex feature with humor a plus. Tops in the current market.

Aquarius release of Vanguard (Lou Perry) production. Directed, written and edited by Jerry Gerard. Camera (color), Harry Flecken, sound, Morris (Gottlieb) set decoration, Len Camp. (No other credits). Reviewed at World Theatre, N.Y., June 12, '72 (No MPAA rating). Running Time: 73 MINS.

Pre-opening word on this latest hardcore feature was hot enough to pack the lunch-time show on opening day at N.Y.'s World Theatre. While "Deep Throat" doesn't quite live up to its advance reputation as the "Ben-Hur" of porno pix, it is a superior piece which stands a head above the current competition.

Lensed in Miami on what appears to be a higher-than-usual budget, pic takes a tongue-in-cheek approach to conventional hetero hardcore, dishing out enough laughs with the main course to prove sexpo features need as much comic relief as suspense.

Plot centers on a young lady disappointed because she fails to "hear bells" during her repeated sex bouts with as many as 14 men at a time. A visit to her accommodating doctor reveals that nature has played her another trick. With practice, the heroine finally experiences a moment right out of "To Catch a Thief," with fireworks, bells, etc. In the happy ending, she also finds a young man with credentials equal to her own.

Pic's technical quality is above-par, including sharp color photography and a satirical musical score which spoofs, among other things, Coca-Cola's "It's the Real Thing" television commercial.

Performances are spirited, especially that of the femme lead, and writer-director-editor Jerry Gerard has put it all together with some style. **Varr.**

Legal Tactics Throat Opts For Full Jury

The adversary hearing for "Deep Throat," originally scheduled for last Friday (8), did not take place as attorneys for the World Theatre, New York, decided to bypass the hearing and opt for a full jury trial.

Police had attempted to seize the "Deep Throat" print three weeks ago but were forced to return it since seizure took place sans an adversary hearing. Lawyers for the World felt such a hearing could result in a judgment finding "probable cause" for an obscenity trial and thus open the World to continuing print seizure until trial date is set. Hope for a better chance with a full jury than with a single judge.

BOX OFFICE 9-11-72

'Deep Throat' Voluntarily Off Screen Until Hearing

BINGHAMTON, N.Y.—Attorney Seymour Detsky, representing Cinecom Theatres in Binghamton City Court, has agreed that the circuit will not show the allegedly "obscene" movie, "Deep Throat," again in Broome County until after a hearing Thursday (14). The accord was in consonance with conditions laid down August 25 by Judge Walter T. Gorman.

The X-rated film, "Deep Throat," was seized Monday night, August 21, by Binghamton city police who entered the Strand Theatre on Chenango Street where the movie had been playing three weeks. Strand manager Michael Sabal and operator Binghamton Theatres Co. were charged with second-degree obscenity, a misdemeanor.

The Strand obtained a second print of "Deep Throat" and showed it again Wednesday night, August 23. Police seized the second film before it had completed its 55-minute run.

BoxOFFICE MAY 15, 1972

EXPLOITATION FEATURE REVIEW

School Girl

Morphic, Inc.

87 Minutes

Rel. Nov. 71

San Francisco-based, this porno feature has sound, color photography and musical scoring as expert as any major feature. What makes it the best of any of this type yet seen is a maximum amount of plot, about 30 minutes' worth. In most of these, the non-erotic footage runs about 5 or 10 minutes. The heroine, a college student, must prepare a paper of an unusual experience for her psychology class. After a sex session with her boyfriend, she buys a sex newspaper and answers several ads. She has relations with an older bachelor, answers obscene phone calls and makes it with a father-son duo. The girl's roommate finds her sexy looks and has intercourse with the instructor of her psychology class. When the heroine brings in her assignment, she says she enjoyed it all. For once, a sex film without guilt. David Reberg directed. Grand prize winner, Amsterdam Adult Film Festival award 1971-72.

Debra Allen, Susan George.

BoxOFFICE SEPT. 25, 1972

Indict Two Memphis Firms
Shipping Obscene Films

MEMPHIS—Criminal prosecution in the federal court is the next step in the fight against what the government charges is the showing of obscene movies in Memphis. The federal Grand Jury returned indictments in Memphis against two corporations and an officer of one on charges of interstate shipment of obscene movies.

The indictments followed recent federal court hearings, in which Judge Robert McKeown viewed the movies in question in open court and found them obscene.

Charged in the indictments are Art Theatre Guild, Inc., and Arnold Jordan, vice-president, for the shipment from New Jersey to Memphis of "an obscene, lewd, lascivious and filthy motion picture, 'School Girl.'"

The grand jury returned a two-count indictment against Academy Films, Inc., for transporting from Iowa to Memphis the films "Peep Freak," and "The Spy" and from London to Memphis of the films "Lust for Two" and "City Women."

The films, impounded by U.S. marshals since raids in May, are still in federal custody. All defendants, on arraignment, pleaded not guilty.

Each count of the indictments provides maximum penalty of five years in jail and a \$5,000 fine. Larry Parrish, assistant

BoxOFFICE MAY 30, 1972

REFUSES TO CURB COPS,
D.A. RE 'DEEP THROAT'

New Orleans, Aug. 29.

U.S. District Judge Lausang L. Mitchell has refused to enjoin the New Orleans Police Dept. from seizing "obscene" films from the Plaza Theatre or the Orleans Parish District Attorney's office from prosecuting the defendants arrested by police.

The attorney for the Art Theatre Guild Inc., an Ohio corporation which operates the theatre, sought a permanent injunction against the city and the D.A.'s office resulting from the seizure of a film, "Deep Throat," at the film house July 24.

The ruling permits prosecution to proceed against Kenneth Eastin, manager of the theatre, and John Brazier, the cashier, who were arrested and charged with contributing to the delinquency of a juvenile and exhibiting obscenity to a minor.

Police also seized business records of the house and a cashbox containing about \$1,000.

BoxOFFICE SEPT. 25, 1972

2 Prints of 'Deep Throat'
Are Returned to Cinecom

BINGHAMTON, N.Y. — Two prints of "Deep Throat," seized by law enforcement officers as "obscene" in August at the Cinecom circuit's Strand Theatre on Chenango Street, have been returned to the corporation. However, according to James M. Barber, Cinecom attorney, there are no plans to exhibit "Deep Throat" in this city until a trial, as-yet unscheduled, has been held to determine the legal status of the film.

Cinecom lawyers Monday (11) waived an adversary hearing that had been slated for Thursday (14) in city court.

Obscenity Issue

Pending Before the U.S. Supreme Court Slows Drive on Smut in Times Square

Mayor Lindsay's campaign against pornography in the Times Square area has been slowed for the time being by an obscenity case pending before the United States Supreme Court.

In two cases last week, films at the police had seized in raids on Times Square theaters had to be returned to the theater operators after their lawyers convinced a Criminal Court judge that his authorization of the seizure was illegal. The cases dealt with sodomy.

A score of raids against peep shows in the Times Square area had the shows down for two days, but legal proceedings against the operators were delayed after the operators obtained injunctions barring the police from interfering with the enterprises.

Seymour S. Detsky, counsel for 10 of the operators, sought an injunction, charging that the police entered the peep-show premises without warrants, seized films before examining them and without warrants and without having an adversary proceeding on their alleged obscenity, and used pickaxes illegally to put the peep-show machines out of business.

By agreement with the city's Corporation Counsel, the police are directed not to interfere with the enterprises, pending a trial of the charges of obscenity and the countercharges in Criminal Court next Tuesday.

The deterioration of the area has been widely attributed to the proliferation of movie theaters showing films on sex perversion, peep shows offering film strips involving what

the owners call "soft-core" pornography, unlicensed "massage parlors" and bookshops peddling books, pamphlets, photographs and devices on sexual themes.

Because of the protests of midtown businessmen, including many from the theater district who believe that the spread of pornography shops has hurt their industry, the Mayor ordered members of his administration to meet with representatives of the District Attorney's office last July 12 to plan a long-range campaign against pornography.

But the campaign met with increasing ineffectuality and, last Thursday, the police found themselves powerless to halt the showing of a film advertised as a portrayal of sodomy.

The film was "Deep Throat,"

presented at the World Theater, 153 West 49th Street, two doors east of a church, the Times Square chapel of the Salvation Army. At the request of the police public morals division, Criminal Court Judge Ernst Rosenberger viewed the film with Patrolman Michael Sullivan on Thursday night, then signed an order authorizing the police to seize the film when the theatre closed at 1 A.M. Friday.

A summons was served on the owner of the theater, Robert Sumner, and he was ordered to appear in court later in the day. Mr. Sumner's lawyers argued that Judge Rosenberger acted contrary to law in signing the authorization because he had failed to give the owner an adversary hearing first on whether the film was obscene.

Judge Rosenberger ordered recess while he researched the law. Returning to the bench at 4 P.M., he said he had to confer with the defense attorney, Seymour Detsky, and ordered the police to return the film. However, he also directed that a subpoena be served upon the lawyers to produce the film in court for a further hearing on Sept. 8.

The issue is one that is to be before the Supreme Court before the Supreme Court rehearing. The court has agreed to decide whether a judge has seen an allegedly obscene movie may issue a search warrant to seize it from a theater without first giving the owner a hearing on whether the film is obscene.

At present, a film case goes through laborious appeals to the High Court, which can take years, before the

can act to halt its presentation, enabling, in a case where crime is proved, the operators to profit from their crime before the law may intervene.

In the "Deep Throat" case, the theater owner, Mr. Sumner, substituted a second print of the film and the house opened on schedule at 10 A.M. Friday with no halt in its activity. The film was still being shown yesterday afternoon.

In a second case, however, involving a film titled "Sticky Situation," seized Thursday at the Hollywood Twin I Theater, Eighth Avenue and 47th Street, the film was not shown again after its seizure on Friday. That case also heard by Judge Rosenberger.

Deputy Inspector Joseph Lynch of the public morals division said his men would continue to hand out summons when they found theaters showing peep shows presenting materials held to be obscene.

The injunctions and the Rosenberger ruling only

THE UNITED STATES OF AMERICA
DO hereby certify that
the following is a true and correct
copy of the original as the same
appears in the records of the
Department of the Interior.

IN WITNESS WHEREOF, I have hereunto
set my hand and the seal of the
Department of the Interior at
Washington, D. C., this 1st day of
January, 1901.

RECORDED
INDEXED
JAN 1 1901
DEPT. OF THE INTERIOR
BUREAU OF LANDS

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1998

SUBJECT INDEX

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-1051

PARIS ADULT THEATRE I, ET AL,
Petitioners,

v.

**LEWIS R. SLATON, DISTRICT ATTORNEY,
ATLANTA JUDICIAL CIRCUIT, ET AL,**
Respondents.

**On Writ Of Certiorari From The
Supreme Court of Georgia**

**MOTION OF CHARLES H. KEATING, JR., FOR LEAVE TO
FILE A BRIEF AS AMICUS CURIAE IN SUPPORT
OF RESPONDENT WITH BRIEF ANNEXED**

Charles H. Keating, Jr., (hereinafter referred to as Moving Party) respectfully moves, pursuant to Rule 42(3) of the Rules of the U. S. Supreme Court, for leave to file a brief as Amicus Curiae in support of the Respondents, Hinson McAuliffe, as Solicitor General of the Criminal Court of Fulton County, Georgia, and Lewis R. Slaton, as District Attorney, Atlanta Judicial Circuit.

Moving Party has a special interest in the subject matter of this appeal, having devoted considerable time, study and effort to assisting law enforcement in combating the spread of obscenity in the Nation: first, as the founder and co-counsel for Citizens for Decent Literature, Inc., and more recently as a member of the Presidential Commission on on Obscenity and Pornography. Moving Party is also the appellee in an obscenity case pending before this Court, entitled, "A Motion Picture Film Entitled 'Vixen', Russ Meyer, Eve Productions, Inc., Malibu, Inc., and Clarence P. Gall v. State of Ohio ex rel Charles H. Keating, Jr., October Term 1971, No. 71-599, as to which this Court on January 12, 1972, requested a response.¹ The latter appeal was carried over to the 1972 October Term without this Court having taken action thereon.

¹In Moving Party's response thereto, see Motion to Affirm at pages 13-18, this Court was urged to grant plenary review in the "Vixen" appeal for several reasons: 1. The appeal involved a civil matter and was limited to the obscenity vel non issue; and 2. the record presented ideal "facts" for review, which included (a) one of the defendants was Producer Russ Meyer, the "King" (and very first) of the pandering motion picture producers; (b) the testimony of defense witness, film historian Arthur Knight, who candidly traced the erosion which has taken place since Russ Meyer started it all, and Russ Meyer's participation therein: (See also Arthur Knight's "tout" of "School Girls" in the Los Angeles Times "Cinema Theatre" ad of Oct. 7, 1972, at Appendix F, page 3) and (c) the testimony of plaintiff's witness, Mr. Melvin Anshell, a practicing psychiatrist and author of "Sex and Sanity," who very logically explained the psychiatric basis for the proscription of obscenity (and this Court's holding in Roth-Alberts, 354 U.S. 476, 485, that it was the universal judgment of civilized nations that obscenity should be restrained). The members of this Court, having viewed "Magic Mirror," produced several years after "Vixen" should make a comparison of the same with "Vixen" (photography, content, musical sound track, etc.) and ask themselves if justice does not require that a case, dealing directly with the producer, be handed down for the enlightenment of and as a warning for those in the trade. See Appendix F, pp 8-11 for Santa Monica article on James R. Haskin, Executive Producer of "Magic Mirror".

The grant of a writ of certiorari herein brings before this Court for oral argument, the first obscenity case dealing with a motion picture film since the grant of a writ of certiorari ten years ago in *Ohio v. Jacobellis*.² In *Jacobellis*, this Court reviewed the felony conviction of Nico Jacobellis, manager of the Heights Art Theater in Cleveland Heights, Ohio, for exhibiting the French imported film "Les Amants" (The Lovers) and examined the interdependent "obscenity" and "scienter" issues, which in the following years have continued to plague this Court.³ Here in the *Paris Adult*

²Jurisdiction was first noted at the commencement of the 1962 October Term. *Jacobellis v. Ohio*, 371 U.S. 808, 9 L.Ed.2d 52, 83 S. Ct. 28 (Oct. 8, 1962). After argument without decision during that term, the case was restored to the docket. *Jacobellis v. Ohio*, 373 U.S. 901, 10 L.Ed.2d 197, 83 S. Ct. 1288 (Apr. 29, 1963). Re-argument did not occur until late in the 1963 October Term (Apr. 1, 1964) with this Court's no-clear majority decision being handed down on the last day of that term. *Jacobellis v. Ohio*, 378 U.S. 184, 12 L.Ed.2d 793, 84 S. Ct. 1672 (June 22, 1964).

The *Jacobellis* decision presents only the law of the case and is not a constitutional precedent which binds this Court. In that decision, Justices Warren, Clark and Harlan dissented and Justices Black and Douglas refused to sit in judgment on the merits and apply the law of the land in *Roth v. U.S.*, 354 U.S. 476, 77 S. Ct. 1314, 1 L.Ed.2d 1498 (June 24, 1957), which holds obscenity legislation constitutional. Of the four remaining Justices, Justice White's vote without opinion can, with reason, be attributed to the criminal aspects of the case and the unfortunate fact that *Jacobellis*, as an alien and convicted felon, would be subject to a denial of citizenship. Compare Justice White's dissenting vote on the same day in the civil case, *Grove Press, Inc. v. Gerstein* (Tropic of Cancer), 378 U.S. 577, 12 L.Ed.2d 1035, 84 S. Ct. 1909 (June 23, 1964). Justice Stewart erroneously applied a "hard-core pornography" reasoning which this Court, in reviewing a state obscenity conviction in *Mishkin v. New York*, 383 U.S. 502, 508, 16 L.Ed.2d 56, 61, 86 S. Ct. 958 (Mar. 21, 1966), held *not* to be the law.

³See, for example, the compromising result reached in the *Redrup* and *Austin* cases, cert. granted, limited to the "scienter" issue in *Redrup v. New York*, 384 U.S. 916, 16 L.Ed.2d 438, 86 S. Ct. 1362 (Apr. 25, 1968), and *Austin v. Kentucky*, 384 U.S. 916, 16 L.Ed.2d 438, 86 S. Ct. 1362 (Apr. 25, 1966), but decided on

Theater case the issues are not so complex - only "obscenity vel non" is being litigated, and that in relation to the fundamental power of a sovereign state, functioning in a civilized society, to proscribe the same as a matter of law, so as to preserve good public morality.

Moving Party submits that the real import of the appeal herein will be apparent only to those members of this Court who are willing to recall to mind from memory the vastly superior state of public morality (sexual) which existed when *Jacobellis* was decided just one short decade ago. Succinctly put, when one dwells for too long a period in a dung heap, the reminiscent smell of fresh air has an elusive manner of escaping the memory.⁴ Without invoking that

other grounds in a no-clear majority decision in *Redrup v. New York*, 386 U.S. 767, 18 L.Ed.2d 515, 87 S. Ct. 1414 (May 8, 1967).

The *Redrup* decision presents only the law of the case, and is not a constitutional precedent which binds this Court. In that decision, Justices Harlan and Clark dissented. Of the seven remaining Justices, Justices Black and Douglas refused to sit in judgment on the merits and apply the law of the land in *Roth*, 354 U.S. 476, 1 L.Ed.2d 1949, 77 S. Ct. 1314 (June 24, 1957), which holds obscenity legislation constitutional. Of the five remaining Justices, Justice Stewart erroneously applied a "hard-core" pornography reasoning which this Court, in reviewing a state obscenity conviction in *Mishkin v. New York*, 383 U.S. 502, 508, 16 L.Ed.2d 56, 61, 86 S. Ct. 958 (Mar. 21, 1966), held not to be the law in state cases.

⁴See the observations of Federal District Judge Peirson Hall, speaking on "The Monster Vice" in *U. S. v. Four (4) Books*, 289 F.Supp. 972 at 973 (Sept. 10, 1968):

"'Vice is a monster of so vile a mien,
As, to be hated, needs but to be seen;
Yet seen too oft, familiar with her face,
We first endure, then pity, then embrace.'"

"The verity of the above quotation is brought home not only by the continually increasing number of periodicals, paperbacks and other printed material glorifying things which most people regard as indecent or obscene, which flood news stands and book-racks, but also, to anyone who has read them, by the recent journeys of the Supreme Court of the United States on the question of 'obscenity'"

¹From Alexander Pope's "Essay on Man."

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

PARIS ADULT THEATRE I ET AL. v. SLATON, DISTRICT ATTORNEY, ET AL.

CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 71-1051. Argued October 19, 1972—Decided June 21, 1973

Respondents sued under Georgia civil law to enjoin the exhibiting by respondents of two allegedly obscene films. There was no prior restraint. In a jury-waived trial, the trial court (which did not require "expert" affirmative evidence of obscenity) viewed the films and thereafter dismissed the complaints on the ground that the display of the films in commercial theaters to consenting adult audiences (reasonable precautions having been taken to exclude minors) was "constitutionally permissible." The Georgia Supreme Court reversed, holding that the films constituted hard-core pornography not within the protection of the First Amendment. *Held*:

1. Obscene material is not speech entitled to First Amendment protection. *Miller v. California*, ante, p. —; *United States v. Roth*, 354 U. S. 476. P. 4.

2. The Georgia civil procedure followed here (assuming use of a constitutionally acceptable standard for determining the issue of obscenity *vel non*) comported with the standards of *Teitel Film Corp. v. Cusak*, 390 U. S. 139; *Freedman v. Maryland*, 380 U. S. 51; and *Kingsley Books, Inc. v. Brown*, 354 U. S. 436. Pp. 4-6.

3. It was not error not to require expert affirmative evidence of the films' obscenity, since the films (which were the best evidence of what they depicted) were themselves placed in evidence. Pp. 6-7.

4. States have a legitimate interest in regulating commerce in obscene material and its exhibition in places of public accommodation, including "adult" theaters. Pp. 7-20.

(a) There is a proper state concern with safeguarding against crime and the other arguably ill effects of obscenity by prohibiting the public or commercial exhibition of obscene material. Though conclusive proof is lacking, the States may reasonably determine

Syllabus

that a nexus does or might exist between antisocial behavior and obscene material, just as States have acted on unprovable assumptions in other areas of public control. Pp. 8-14.

(b) Though States are free to adopt a *laissez faire* policy toward commercialized obscenity, they are not constitutionally obliged to do so. P. 15.

(c) Exhibition of obscene material in places of public accommodation is not protected by any constitutional doctrine of privacy. A commercial theater cannot be equated with a private home; nor is there here a privacy right arising from a special relationship, such as marriage. *Stanley v. Georgia*, 394 U. S. 557; *Griswold v. Connecticut*, 381 U. S. 479, distinguished. Nor can the privacy of the home be equated with a "zone" of "privacy" that follows a consumer of obscene materials wherever he goes. *United States v. Orito*, *post*, p. —; *United States v. 12 200-Ft. Reels*, *post*, p. —. Pp. 15-17.

(d) Preventing the unlimited display of obscene material is not thought control. P. 18.

(e) Not all conduct directly involving "consenting adults" only has a claim to constitutional protection. Pp. 18-20.

5. The Georgia obscenity laws involved herein should now be re-evaluated in the light of the First Amendment standards newly enunciated by the Court in *Miller v. California*, *ante*, p. —. P. 21.

228 Ga. 343, 185 S. E. 2d 768, vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion. BRENNAN, J., filed a dissenting opinion, in which STEWART and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-1051

Paris Adult Theatre I et al,
Petitioners,

v.

Lewis R. Slaton, District At-
torney, Atlanta Judicial
Circuit, et al.

On Writ of Certiorari to
the Supreme Court of
Georgia.

[June 21, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Petitioners are two Atlanta, Georgia, movie theatres and their owners and managers, operating in the style of "adult" theatres. On December 28, 1970, respondents, the local state district attorney and the solicitor for the local state trial court, filed civil complaints in that court alleging that petitioners were exhibiting to the public for paid admission two allegedly obscene films, contrary to Georgia Code § 26-2101.¹ The two films in question, "Magic Mirror" and "It All Comes

¹This is a civil proceeding. Georgia Code § 26-2101 defines a criminal offense, but the exhibition of materials found to be "obscene" as defined by that statute may be enjoined in a civil proceeding under Georgia case law. *1024 Peachtree Corp. v. Slaton*, 228 Ga. 102 (1971). *Walter v. Slaton*, 227 Ga. 676 (1971). *Evans Theatre Corp. v. Slaton*, 227 Ga. 377 (1971). See p. 5, *infra*. Georgia Code § 26-2101 reads in relevant part:

"Distributing obscene materials.—(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the

Out in the End," depict sexual conduct characterized by the Georgia Supreme Court as "hard core pornography" leaving "little to the imagination."

Respondents' complaints, made on behalf of the State of Georgia, demanded that the two films be declared obscene and that petitioners be enjoined from exhibiting the films. The exhibition of the films was not enjoined, but a temporary injunction was granted *ex parte* by the local trial court, restraining petitioners from destroying the films or removing them from the jurisdiction. Respondents were further ordered to have one print each of the films in court on January 13, 1971, together with the proper viewing equipment.

On January 13, 1971, 15 days after the proceedings began, the films were produced by petitioners at a jury-waived trial. Certain photographs, also produced at trial, were stipulated to portray the single entrance to both Paris Adult Theatre I and Paris Adult Theatre II

obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do

"(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. . . .

"(d) A person convicted of distributing obscene material shall for the first offense be punished as for a misdemeanor, and for any subsequent offense shall be punished by imprisonment for not less than one nor more than five years, or by a fine not to exceed \$5,000, or both."

The constitutionality of Georgia Code § 26-2101 was upheld against First Amendment and due process challenges in *Gable v. Jenkins*, 300 F. Supp. 998 (ND Ga. 1970), *aff'd per curiam*, 397 U. S. 592 (1970).

as it appeared at the time of the complaints. These photographs show a conventional, inoffensive theatre entrance, without any pictures, but with signs indicating that the theatres exhibit "Atlanta's Finest Mature Feature Films." On the door itself is a sign saying: "Adult Theatre—You must be 21 and able to prove it. If viewing the nude body offends you, Please Do Not Enter."

The two films were exhibited to the trial court. The only other state evidence was testimony by criminal investigators that they had paid admission to see the films and that nothing on the outside of the theatre indicated the full nature of what was shown. In particular, nothing indicated that the films depicted—as they did—scenes of simulated fellatio, cunnilingus, and group sex intercourse. There was no evidence presented that minors had ever entered the theatres. Nor was there evidence presented that petitioners had a systematic policy of barring minors, apart from posting signs at the entrance. On April 12, 1971, the trial judge dismissed respondents' complaints. He assumed "that obscenity is established," but stated:

"It appears to the Court that the display of these films in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible."

On appeal, the Georgia Supreme Court unanimously reversed. It assumed that the adult theatres in question barred minors and gave a full warning to the general public of the nature of the films shown, but held that the films were without protection under the First Amendment. Citing the opinion of this Court in *United States v. Reidel*, 402 U. S. 351 (1971), the Georgia court stated that "the sale and delivery of obscene material to willing adults is not protected under the first amendment." The

Georgia court also held *Stanley v. Georgia*, 394 U. S. 557 (1969), to be inapposite since it did not deal with "the commercial distribution of pornography, but with the right of Stanley to possess, in the privacy of his home, pornographic films." 228 Ga., at 345; 185 S. E. 2d, at 769. After viewing the films, the Georgia Supreme Court held that their exhibition should have been enjoined, stating:

"The films in this case leave little to the imagination. It is plain what they purport to depict, that is, conduct of the most salacious character. We hold that these films are also hard core pornography, and the showing of such films should have been enjoined since their exhibition is not protected by the first amendment." 228 Ga., at 347; 185 S. E. 2d, at 770.

I

It should be clear from the outset that we do not undertake to tell the States what they must do, but rather to define the area in which they may chart their own course in dealing with obscene material. This Court has consistently held that obscene material is not protected by the First Amendment as a limitation on the state police power by virtue of the Fourteenth Amendment. *Miller v. California*, — U. S. — (pp. 8-10) (1973). *Kois v. Wisconsin*, 408 U. S. 229, 230 (1972). *United States v. Reidel*, 402 U. S. 351, 354 (1972). *United States v. Roth*, 354 U. S. 476, 485 (1957).

Georgia case law permits a civil injunction of the exhibition of obscene materials. See *1024 Peachtree Corporation v. Slaton*, 228 Ga. 102 (1971); *Walter v. Slaton*, 227 Ga. 676 (1971); *Evans Theatre Corp. v. Slaton*, 227 Ga. 377 (1971). While this procedure is civil in nature, and does not directly involve the state criminal statute

proscribing exhibition of obscene material,² the Georgia case law permitting civil injunction does adopt the definition of "obscene materials" used by the criminal statute.³ Today, in *Miller v. California, supra*, we have sought to clarify the constitutional definition of obscene material subject to the regulation by the States, and we vacate and remand this case for reconsideration in light of *Miller*.

This is not to be read as disapproval of the Georgia civil procedure employed in this case, assuming the use of a constitutionally acceptable standard for determining what is unprotected by the First Amendment. On the contrary, such a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation.⁴ See *Kingsley Books, Inc. v. Brown*,

² See Georgia Code § 26-2101, set out at n. 1, pp. 1-2, *supra*.

³ In *Walter v. Slaton, supra*, the Georgia Supreme Court described the cases before it as follows:

"Each case was commenced as a civil action by the District Attorney of the Superior Court of Fulton County jointly with the Solicitor of the Criminal Court of Fulton County. In each case the plaintiffs alleged that the defendants named therein were conducting a business of exhibiting motion picture films to members of the public; that they were in control and possession of the described motion picture film which they were exhibiting to the public on a fee basis; that said film 'constitutes a flagrant violation of Ga. Code § 26-2101 in that the sole and dominant theme of the motion picture film . . . considered as a whole, and applying contemporary standards, appeals to the prurient interest in sex and nudity, and that said motion picture film is utterly and absolutely without any redeeming social value whatsoever and transgresses beyond the customary limits of candor in describing and discussing sexual matters.'" 227 Ga., at 676-677 (1971).

⁴ This procedure would have even more merit if the exhibitor or purveyor could also test the issue of obscenity in a similar civil action,

354 U. S. 436, 441-444 (1957). Here, Georgia imposed no restraint on the exhibition of the films involved in this case until after a full adversary proceeding and a final judicial determination by the Georgia Supreme Court that the materials were constitutionally unprotected.⁵ Thus the standards of *Blount v. Rizzi*, 400 U. S. 410, 417 (1971); *Teitel Film Corp. v. Cusack*, 390 U. S. 139, 141-142 (1968); *Freedman v. Maryland*, 380 U. S. 51, 58-59 (1965), and *Kingsley Books, Inc. v. Brown*, *supra*, 354 U. S., at 443-445 (1957), were met. Cf. *United States v. Thirty-Seven Photographs*, 402 U. S. 363, 367-369 (1971) (opinion of WHITE, J.).

Nor was it error to fail to require "expert" affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence. *United States v. Groner*, — F. 2d — (slip opinion, at pp. 2-20) (May 22, 1973) (CA5 1973). *Id.*, — F. 2d, at — (slip opinion, at 21-25) (Ainsworth, J., concurring). *Id.*, — F. 2d, at — (slip opinion, at 27-28) (Clark, J., concurring). *United States v. Wild*, 422 F. 2d 34, 35-36 (CA2 1970), cert. denied, 402 U. S. 986 (1971). *Kahm v. United States*, 300 F. 2d 78, 84 (CA5), cert. denied, 360 U. S. 859 (1962). *State v. Amato*, 49 Wis. 2d 638, 645 (1971), cert. denied *sub. nom. Amato v. Wisconsin*, 404 U. S. 1063 (1972). See *Smith v. California*, 361 U. S. 147, 172 (1959) (Harlan, J., concurring and dissenting); *United States v. Brown*, 328 F. Supp. 196, 199 (ED Va.

prior to any exposure to criminal penalty. We are not here presented with the problem of whether a holding that materials were not obscene could be circumvented in a later proceeding by evidence of pandering. See *Memoirs v. Massachusetts*, 383 U. S. 413, 458, n. 3 (1966) (Harlan, J., dissenting); *Ginsburg v. United States*, 383 U. S. 463, 496 (1966) (Harlan, J., dissenting).

⁵ At the specific request of petitioner's counsel, the copies of the films produced for the trial court were placed in the "administrative custody" of that court pending the outcome of this litigation.

1971). The films, obviously, are the best evidence of what they represent.* "In the cases in which this Court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question." *Ginzburg v. United States*, 383 U. S. 463, 465 (1966).

II

We categorically disapprove the theory, apparently adopted by the trial judge, that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only. This holding was properly rejected by the Georgia Supreme Court. Although we have often pointedly recognized the high importance of the state interest in regulating the exposure of obscene materials to juveniles and unconsenting adults, see *Miller v. California, supra*, — U. S., at — (pp. 3-5) (1973); *Stanley v. Georgia*, 394 U. S. 557,

*This is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. Cf. *Wigmore on Evidence* (3d ed.), §§ 556, 559. No such assistance is needed by jurors in obscenity cases; indeed the "expert witness" practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony. See *United States v. Groner, supra*, — F. 2d, at — (slip opinion, at pp. 19-20) (1973); *Id.*, — F. 2d, at — (slip opinion, at pp. 24-25) (Ainsworth, J., concurring). "Simply stated hard core pornography . . . can and does speak for itself." *United States v. Wild, supra*, 422 F. 2d, at 36 (CA2 1970), cert. denied, 402 U. S. 986 (1971). We reserve judgment, however, on the extreme case, not presented here, where contested materials are directed at such a bizarre deviant group that the experience of the trier-of-fact would be plainly inadequate to judge whether the material appeals to the prurient interest. See *Mishkin v. New York*, 383 U. S. 502, 508-510 (1966); *United States v. Klaw*, 350 F. 2d 155, 167-168 (CA2 1965).

567 (1969); *Redrup v. New York*, 386 U. S. 767, 769 (1967), this Court has never declared these to be the only legitimate state interests permitting regulation of obscene material. The States have a long-recognized legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation, as long as these regulations do not run afoul of specific constitutional prohibitions. See *United States v. Thirty-Seven Photographs*, 402 U. S. 363, 376-377 (opinion of WHITE, J.) (1971); *United States v. Reidel*, 402 U. S. 351, 354-356 (1971). Cf. *United States v. Thirty-Seven Photographs*, 402 U. S. 363, 378 (1971) (concurring opinion of STEWART, J.). "In an unbroken series of cases extending over a long stretch of this Court's history, it has been accepted as a postulate that 'the primary requirements of decency may be enforced against obscene publications.' *Id.* [*Near v. Minnesota*, 283 U. S. 697 (1931)], at 716." *Kingsley Books, Inc. v. Brown*, *supra*, 354 U. S., at 440 (1957).

In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to the passerby.⁷ Rights and interests "other than those of the

⁷ It is conceivable that an "adult" theatre can—if it really insists—prevent the exposure of its obscene wares to juveniles. An "adult" bookstore, dealing in obscene books, magazines, and pictures, cannot realistically make this claim. The Hill-Link Minority Report of the Commission on Obscenity and Pornography emphasizes evidence (the Abelson National Survey of Youth and Adults) that, although most pornography may be bought by elders, "the heavy users and most highly exposed people to pornography are adolescent females (among women) and adolescent and young males (among men)." The Report of the Commission on Obscenity (1970 ed.), 401. The legitimate interest in preventing exposure of juveniles to obscene materials cannot be fully served by simply barring juveniles from the immediate physical premises of "adult" book-

advocates are involved." Cf. *Breard v. Alexandria*, 341 U. S. 622, 642 (1951). These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself. The Hill-Link Minority Report of the Commission on Obscenity and Pornography indicates that there is at least an arguable correlation between obscene material and crime.⁸ Quite apart from sex crimes, however, there remains one problem of large proportions aptly described by Professor Bickel:

"It concerns the tone of the society, the mode, or to use terms that have perhaps greater currency,

stores, when there is a flourishing "outside business" in these materials.

⁸The Report of the Commission on Obscenity and Pornography (1970 ed.), 390-412 (Hill-Link Minority Report). For a discussion of earlier studies indicating "a division of thought [among behavioral scientists] on the correlation between obscenity and socially deleterious behavior" and references to expert opinions that obscene material may induce crime and antisocial conduct, see *Memoirs v. Massachusetts*, *supra*, 383 U. S., at 451-453 (1966) (Clark, J., dissenting). As Mr. Justice Clark emphasized: "While erotic stimulation caused by pornography may be legally insignificant in itself, there are medical experts who believe that such stimulation frequently manifests itself in criminal sexual behavior or other antisocial conduct. For example, Dr. George W. Henry of Cornell University has expressed the opinion that obscenity, with its exaggerated and morbid emphasis on sex, particularly abnormal and perverted practices, and its unrealistic presentation of sexual behavior and attitudes, may induce antisocial conduct by the average person. A number of sociologists think that this material may have adverse effects upon individual mental health, with potentially disruptive consequences for the community.

"Congress and the legislatures of every State have enacted measures to restrict the distribution of erotic and pornographic material, justifying these controls by reference to evidence that antisocial behavior may result in part from reading obscenity." [Footnotes omitted.] *Id.*, 383 U. S., at 452-453.

the style and quality of life, now and in the future. A man may be entitled to read an obscene book in his room, or expose himself indecently there. . . . We should protect his privacy. But if he demands a right to obtain the books and pictures he wants in the market, and to foregather in public places—discreet, if you will, but accessible to all—with others who share his tastes, *then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies.* Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it or not.” 22 *The Public Interest* 25, 25-26 (Winter, 1971).⁹ (Emphasis supplied.)

As Chief Justice Warren stated there is a “right of the Nation and of the States to maintain a decent society . . .,” *Jacobellis v. Ohio*, 378 U. S. 184, 199 (1964) (Warren, C. J., dissenting).¹⁰ See *Memoirs v. Massachusetts*, 383 U. S. 413, 457 (1966) (Harlan, J., dissenting); *Beauharnais v. Illinois*, 343 U. S. 250, 256-257 (1952); *Kovacs v. Cooper*, 336 U. S. 77, 86-88 (1940).

⁹ See also Berns, *Pornography v. Democracy: The Case for Censorship*, in 22 *The Public Interest* 3 (Winter, 1971); Van der Haag, *Censorship: For and Against* (H. H. Hart ed., 1971), 156-157.

¹⁰ “In this and other cases in this area of the law, which are coming to us in ever-increasing numbers, we are faced with the resolution of rights basic both to individuals and to society as a whole. Specifically, we are called upon to reconcile the right of the Nation and of the States to maintain a decent society and, on the other hand, the right of individuals to express themselves freely in accordance with the guarantees of the First and Fourteenth Amendments.” *Jacobellis v. Ohio*, *supra*, 378 U. S., at 199 (1964) (Warren, C. J., dissenting).

But, it is argued, there is no scientific data which conclusively demonstrates that exposure to obscene materials adversely affects men and women or their society. It is urged on behalf of the petitioner that, absent such a demonstration, any kind of state regulation is "impermissible." We reject this argument. It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself.¹¹ MR. JUSTICE BRENNAN, speaking for the Court in *Ginsberg v. New York*, 390 U. S. 629, 643 (1968), said "We do not demand of legislatures 'scientifically certain criteria of legislation.' *Noble State Bank v. Haskell*, 219 U. S. 104, 110." Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist. In deciding *Roth*, this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect "*the social interest in order and morality.*" *Roth v. United States*, *supra*, 354 U. S., at 485 (1957), quoting *Chaplinsky v. New Hampshire*, 315 U. S. 568, 572 (1942) (emphasis added in *Roth*).¹²

¹¹ Mr. Justice Holmes stated in another context, that:

"[T]he proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain." *Tyson & Brother v. Banton*, 273 U. S. 418, 446 (1927) (dissenting opinion concurred in by Brandeis, J.).

¹² "It has been well observed that such [lewd and obscene] utterances are no essential part of any exposition of ideas, and are of such light social value as a step to truth that any benefit that

From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs. See *Ferguson v. Skrupa*, 372 U. S. 726, 730 (1963); *Breard v. Alexandria*, 341 U. S. 622, 632-633, 641-645 (1951); *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U. S. 525, 536-537 (1949). The same is true of the federal securities, antitrust laws and a host of other federal regulations. See *SEC v. Capital Gains Research Bureau, Inc.*, 375 U. S. 180, 186-195 (1963); *American Power & Light Co. v. SEC*, 329 U. S. 90, 99-103 (1946); *North American Co. v. SEC*, 327 U. S. 686, 705-707 (1946), and cases cited. See also *Brooks v. United States*, 267 U. S. 432, 436-437 (1925), and *Hoke v. United States*, 227 U. S. 308, 322 (1913). On the basis of these assumptions both Congress and state legislatures have, for example, drastically restricted associational rights by adopting antitrust laws, and have strictly regulated public expression by issuers of and dealers in securities, profit sharing "coupons," and "trading stamps," commanding what they must and may not publish and announce. See *Sugar Institute, Inc. v. United States*, 297 U. S. 553, 597-602 (1963); *Merrick v. N. W. Halsey & Co.*, 242 U. S. 568, 584-589 (1917); *Caldwell v. Sioux Falls Stock Yard Co.*, 242 U. S. 559, 567-568 (1917); *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 548-552 (1917); *Tanner v. Little*, 240 U. S. 369, 383-386 (1916); *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, 363-368 (1916). Understandably those who entertain an absolutist view of the First Amendment find it uncomfortable to explain why rights of association, may be derived from them is clearly outweighed by the social interest in order and morality." *Roth v. United States*, *supra*, 354 U. S., at 485 (1957), quoting *Chaplinsky v. New Hampshire*, 315 U. S., *supra*, at 572 (1942) (emphasis added in Roth).

speech, and press should be severely restrained in the marketplace of goods and money, but not in the marketplace of pornography.

Likewise, when legislatures and administrators act to protect the physical environment from pollution and to preserve our resources of forests, streams and parks, they must act on such imponderables as the impact of a new highway near or through an existing park or wilderness area. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U. S. 402, 417-420 (1971). Thus the Federal-Aid Highway Act of 1968, 82 Stat. 823, 23 U. S. C. § 138, and the Department of Transportation Act of 1966, 82 Stat. 824, 49 U. S. C. § 1653 (p), have been described by Mr. Justice Black as "a solemn determination of the highest law-making body of this Nation that beauty and health-giving facilities of our parks are not to be taken away for public roads without hearings, factfindings, and policy determinations under the supervision of a Cabinet officer. . . ." *Citizens to Preserve Overton Park, supra*, 401 U. S., at 421 (separate opinion joined by BRENNAN, J.) (1971). The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional.

If we accept the unprovable assumption that a complete education requires certain books, see *Bd. of Education v. Allen*, 392 U. S. 236, 245 (1968), and *Johnson v. New York Educational Department*, 449 F. 2d 871, 882-883 (1971) (dissenting opinion), vacated and remanded to consider mootness, 409 U. S. 75 (1972), *id.*, 409 U. S., at 76-77 (MARSHALL, J., concurring), and the well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality and develop character, can we then say that a state legislature may not act on the corollary assumption

that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior? "Many of these effects may be intangible and indistinct, but they are nonetheless real." *American Power & Light Co., supra*, 329 U. S., at 103 (1946). Mr. Justice Cardozo said that all laws in Western civilization are "guided by a robust common sense. . . ." *Steward Machine Co. v. Davis*, 301 U. S. 548, 590 (1937). The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.

It is argued that individual "free will" must govern, even in activities beyond the protection of the First Amendment and other constitutional guarantees of privacy, and that Government cannot legitimately impede an individual's desire to see or acquire obscene plays, movies, and books. We do indeed base our society on certain assumptions that people have the capacity for free choice. Most exercises of individual free choice—those in politics, religion, and expression of ideas—are explicitly protected by the Constitution. Totally unlimited play for free will, however, is not allowed in ours or any other society. We have just noted, for example, that neither the First Amendment nor "free will" precludes States from having "blue sky" laws to regulate what sellers of securities may write or publish about their wares. See p. 12, *supra*. Such laws are to pro-

tect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition. Nor do modern societies leave disposal of garbage and sewage up to the individual "free will," but impose regulation to protect both public health and the appearance of public places. States are told by some that they must await a "laissez faire" market solution to the obscenity-pornography problem, paradoxically "by people who have never otherwise had a kind word to say for laissez-faire," particularly in solving urban, commercial, and environmental pollution problems. See Kristol, *On the Democratic Idea in America* (1972 ed.) 37.

The States, of course, may follow such a "laissez faire" policy and drop all controls on commercialized obscenity, if that is what they prefer, just as they can ignore consumer protection in the market place, but nothing in the Constitution *compels* the States to do so with regard to matters falling within state jurisdiction. See *United States v. Reidel*, 402 U. S. 351, 357 (1971); *Memoirs v. Massachusetts*, 383 U. S. 413, 462 (1966) (WHITE, J., dissenting). "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs or social conditions." *Griswold v. Connecticut*, 381 U. S. 479, 482 (1965). See *Ferguson v. Skrupa*, *supra*, 372 U. S., at 731 (1963); *Day-Brite Lighting, Inc. v. Missouri*, *supra*, 342 U. S., at 423 (1952).

It is asserted, however, that standards for evaluating state commercial regulations are inapposite in the present context, as state regulation of access by consenting adults to obscene material violates the constitutionally protected right to privacy enjoyed by petitioners' customers. Even assuming that petitioners have vicarious standing to assert potential customers' rights, it is unavailing to compare a theatre, open to the public for

a fee, with the private home of *Stanley v. Georgia*, 394 U. S. 557, 568 (1969), and the marital bedroom of *Griswold v. Connecticut*, 381 U. S. 479, 485-486 (1965). This Court, has, on numerous occasions, refused to hold that commercial ventures such as a motion-picture house are "private" for the purpose of civil rights litigation and civil rights statutes. See *Sullivan v. Little Hunting Park, Inc.*, 396 U. S. 229, 236 (1969). *Daniel v. Paul*, 395 U. S. 298, 305-308 (1969). *Blow v. North Carolina*, 379 U. S. 684, 685-686 (1965). *Hamm v. Rock Hill*, 379 U. S. 306, 307-308 (1964). *Heart of Atlanta Motel, Inc. v. United States*, 379 U. S. 241, 247, 260-261 (1964). The Civil Rights Act of 1964 specifically defines motion-picture houses and theatres as places of "public accommodation" covered by the Act as operations affecting commerce. 42 U. S. C. §§ 2000a (b)(3), (c).

Our prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included "only those personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'" *Palko v. Connecticut*, 302 U. S. 319, 325." *Roe v. Wade*, 410 U. S. 113, 152 (1973). This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing. Cf. *Eisenstadt v. Baird*, 405 U. S. 438, 453-454, *id.*, at 460, 463-465 (WHITE, J., concurring) (1972); *Stanley v. Georgia*, *supra*, 394 U. S., at 568 (1969); *Loving v. Virginia*, 388 U. S. 1, 12 (1967); *Griswold v. Connecticut*, *supra*, 381 U. S., at 486 (1965); *Prince v. Massachusetts*, 321 U. S. 158, 166 (1944); *Skinner v. Oklahoma*, 316 U. S. 535, 451 (1942); *Pierce v. Society of Sisters*, 268 U. S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U. S. 390, 399 (1923). Nothing, however, in this Court's decisions intimates that there is any "fundamental" privacy right "implicit in the concept of ordered

liberty" to watch obscene movies in places of public accommodation.

If obscene material unprotected by the First Amendment in itself carried with it a "penumbra" of constitutionally protected privacy, this Court would not have found it necessary to decide *Stanley* on the narrow basis of the "privacy of the home," which was hardly more than a reaffirmation that "a man's home is his castle." *Stanley v. Georgia, supra*, 394 U. S. 557, at 564 (1969).¹³ Moreover, we have declined to equate the privacy of the home relied on in *Stanley* with a "zone" of "privacy" that follows a distributor or a consumer of obscene materials wherever he goes. See *United States v. Orito*, — U. S. — (pp. 2-4) (1973); *United States v. Twelve 200-Ft. Reels*, — U. S. — (pp. 3-6) (1973); *United States v. Thirty-Seven Photographs*, 402 U. S. 363, 376-377 (1971) (opinion of WHITE, J.); *United States v. Reidel*, 402 U. S. 351, 355 (1971). The idea of a "privacy" right and a place of public accommodation are, in this context, mutually exclusive. Conduct or depictions of conduct that the state police power can prohibit on a public street does not become automatically protected by the Constitution merely because the conduct is moved to a bar or a "live" theatre stage, any more than a "live" performance of a man and woman locked in a sexual em-

¹³ The protection afforded by *Stanley v. Georgia, supra*, is restricted to a place, the home. In contrast, the constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved. Cf. *Roe v. Wade, supra*, 410 U. S., at 152-154 (1973); *Griswold v. Connecticut, supra*, 381 U. S., at 485-486. Obviously, there is no necessary or legitimate expectation of privacy which would extend to marital intercourse on a street corner or a theatre stage.

brace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue.

It is also argued that the State has no legitimate interest in "control [of] the moral content of a person's thoughts," *Stanley v. Georgia, supra*, 394 U. S., at 566 (1969), and we need not quarrel with this. But we reject the claim that the State of Georgia is here attempting to control the minds or thoughts of those who patronize theatres. Preventing unlimited display or distribution of obscene material, which by definition lacks any serious literary, artistic, political, or scientific value as communication, *Miller v. California, supra*, — U. S., at — (pp. 9-10, 20) (1973), is distinct from a control of reason and the intellect. Cf. *Kois v. Wisconsin*, 408 U. S. 229 (1972); *Roth v. United States, supra*, 354 U. S., at 485-487 (1957); *Thornhill v. Alabama, supra*, 310 U. S. 88, 101-102 (1940); Finnis, "Reason and Passion": The Constitutional Dialectic of Free Speech and Obscenity, 116 U. Pa. L. Rev. 222, 229-230, 241-243. Where communication of ideas, protected by the First Amendment, is not involved, nor the particular privacy of the home protected by *Stanley*, nor any of the other "areas or zones" of constitutionally protected privacy, the mere fact that, as a consequence, some human "utterances" or "thoughts" may be incidentally affected does not bar the State from acting to protect legitimate state interests. Cf. *Roth v. United States, supra*, 354 U. S., at 483, 485-487 (1957); *Beauharnais v. Illinois*, 343 U. S. 250, 256-257 (1952). The fantasies of a drug addict are his own and beyond the reach of government, but government regulation of drug sales is not prohibited by the Constitution. Cf. *United States v. Reidel, supra*, 402 U. S., at 359-360 (1971) (Harlan, J., concurring).

Finally, petitioners argue that conduct which directly

involves "consenting adults" only has, for that sole reason, a special claim to constitutional protection. Our Constitution establishes a broad range of conditions on the exercise of power by the States, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation,¹⁴ that is a step we are unable to take.¹⁵ Commercial exploitation of depictions, descriptions, or exhibitions of obscene conduct on commercial premises open to the adult public falls within a State's broad power to regulate commerce and protect the public environment. The issue in this context goes beyond whether someone, or even the majority, considers the

¹⁴ Cf. Mill, *On Liberty* (1955 ed.), 13.

¹⁵ The state statute books are replete with constitutionally unchallenged laws against prostitution, suicide, voluntary self-mutilation, brutalizing "bare fist" prize fights, and duels, although these crimes may only directly involve "consenting adults." Statutes making bigamy a crime surely cut into an individual's freedom to associate, but few today seriously claim such statutes violate the First Amendment or any other constitutional provision. See *Davis v. Beason*, 133 U. S. 333, 344-345 (1890). Consider also the language of this Court in *McLaughlin v. Florida*, 379 U. S. 184, 196 (1964), as to adultery, *Southern Surety Co. v. Oklahoma*, 241 U. S. 582, 586 (1916), as to fornication; *Hoke v. United States*, 227 U. S. 308, 320-322 (1913), and *Caminetti v. United States*, 242 U. S. 470, 484-487, 491-492 (1917), as to "white slavery"; *Murphy v. California*, 225 U. S. 623, 629 (1912), as to billiard halls; and *The Lottery Case*, 188 U. S. 321, 355-356 (1903), as to gambling. See also the summary of state statutes prohibiting bear baiting, cockfighting, and other brutalizing animal "sports," in Stevens, *Fighting and Baiting, Animals and Their Legal Rights* (Leavitt ed., 1970 ed.), 112-127. As Professor Kristol has observed "Bearbaiting and cockfighting are prohibited only in part out of compassion for the suffering animals; the main reason they were abolished was because it was felt that they debased and brutalized the citizenry who flocked to witness such spectacles." On the Democratic Idea in America, *supra*, 33.

conduct depicted as "wrong" or "sinful." The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Chief Justice Warren's words, the States' "right . . . to maintain a decent society." *Jacobellis v. Ohio*, *supra*, 378 U. S., at 199 (1964) (dissenting opinion).

To summarize, we have today reaffirmed the basic holding of *United States v. Roth*, *supra*, that obscene material has no protection under the First Amendment. See *Miller v. California*, *supra*, and *Kaplan v. California*, — U. S. — (1973). We have directed our holdings, not at thoughts or speech, but at depiction and description of specifically defined sexual conduct that States may regulate within limits designed to prevent infringement of First Amendment rights. We have also reaffirmed the holdings of *United States v. Reidel*, *supra*, and *United States v. Thirty-Seven Photographs*, *supra*, that commerce in obscene material is unprotected by any constitutional doctrine of privacy. *United States v. Orito*, *supra*, — U. S. —, at — (pp. 2-4) (1973); *United States v. Twelve 200-Ft. Reels*, *supra*, — U. S. —, at — (pp. 4-6) (1973). In this case we hold that the States have a legitimate interest in regulating commerce in obscene material and in regulating exhibition of obscene material in places of public accommodation, including so-called "adult" theatres from which minors are excluded. In light of these holdings, nothing precludes the State of Georgia from the regulation of the allegedly obscene materials exhibited in Paris Adult Theatre I or II, provided that the applicable Georgia law, as written or authoritatively interpreted by the Georgia courts, meets the First Amendment standards set forth in *Miller v. California*, *supra*, — U. S.,

at — (pp. 9-11). The judgment is vacated and the case remanded to the Georgia Supreme Court for further proceedings not inconsistent with this opinion and *Miller v. California, supra*. See *United States v. 12 200-Ft. Reels*, — U. S. —, — (p. 7, n. 7) (1973).

Vacated and remanded for further proceedings.

SUPREME COURT OF THE UNITED STATES

No. 71-1051

Paris Adult Theatre I et al,
Petitioners,

v.

Lewis R. Slaton, District At-
torney, Atlanta Judicial
Circuit, et al.

On Writ of Certiorari to
the Supreme Court of
Georgia.

[June 21, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

This case requires the Court to confront once again the vexing problem of reconciling state efforts to suppress sexually oriented expression with the protections of the First Amendment, as applied to the States through the Fourteenth Amendment. No other aspect of the First Amendment has, in recent years, demanded so substantial a commitment of our time, generated such disharmony of views, and remained so resistant to the formulation of stable and manageable standards. I am convinced that the approach initiated 15 years ago in *Roth v. United States*, 354 U. S. 476 (1957), and culminating in the Court's decision today, cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values, and I have concluded that the time has come to make a significant departure from that approach.

In this civil action in the Superior Court of Fulton County, the State of Georgia sought to enjoin the showing of two motion pictures, *It All Comes Out In The*

End, and Magic Mirror, at the Paris Adult Theatres (I and II) in Atlanta, Georgia. The State alleged that the films were obscene under the standards set forth in Georgia Code § 26-2101.¹ The trial court denied injunctive relief, holding that even though the films could be considered obscene, their commercial presentation could not constitutionally be barred in the absence of proof that they were shown to minors or unconsenting adults. Reversing, the Supreme Court of Georgia found the films obscene, and held that the care taken to avoid exposure to minors and unconsenting adults was without constitutional significance.

I

The Paris Adult Theatres are two commercial cinemas, linked by a common box office and lobby, on Peachtree Street in Atlanta, Georgia. On December 28, 1970, investigators employed by the Criminal Court of Fulton County entered the theatres as paying customers and viewed each of the films which are the subject of this action. Thereafter, two separate complaints, one for each of the two films, were filed in the Superior Court seeking a declaration that the films were obscene and an injunction against their continued presentation to the public. The complaints alleged that the films were "a flagrant violation of Georgia Code Section 26-2101 in that the sole and dominant theme[s] of the said

¹ Ga. Code § 26-2101 provides in pertinent part that

"(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it."

motion picture film[s] considered as a whole and applying contemporary community standards [appeal] to the prurient interest in sex, nudity and excretion, and the said motion picture film[s are] utterly without any redeeming social value whatsoever, and [transgress] beyond the customary limits of candor in describing and discussing sexual matters." App. 20, 39.

Although the language of the complaints roughly tracked the language of § 26-2101, which imposes criminal penalties on persons who knowingly distribute obscene materials,² this proceeding was not brought pursuant to that statute. Instead, the State initiated a nonstatutory civil proceeding to determine the obscenity of the films and to enjoin their exhibition. While the parties waived jury trial and stipulated that the decision of the trial court would be final on the issue of obscenity, the State has not indicated whether it intends to bring a criminal action under the statute in the event that it succeeds in proving the films obscene.

Upon the filing of the complaints, the trial court scheduled a hearing for January 13, 1971, and entered an order temporarily restraining the defendants from concealing, destroying, altering or removing the films from the jurisdiction, but not from exhibiting the films to the public *pendente lite*. In addition to viewing the films at the hearing, the trial court heard the testimony of witnesses and admitted into evidence photographs that were stipulated to depict accurately the facade of the theatre. The witnesses testified that the exterior

² Ga. Code § 26-2101 (a):

"A person commits the offense of distributing obscene materials [as described in subsection (b), n. 1, *supra*] when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do"

of the theatre was adorned with prominent signs reading "Adults Only," "You Must Be 21 and Able to Prove It," and "If the Nude Body Offends You, Do Not Enter." Nothing on the outside of the theatre described the films with specificity. Nor were pictures displayed on the outside of the theatre to draw the attention of passers-by to the contents of the films. The admission charge to the theatres was \$3. The trial court heard no evidence that minors had ever entered the theatre, but also heard no evidence that petitioners had enforced a systematic policy of screening out minors (apart from the posting of the notices referred to above).

On the basis of the evidence submitted, the trial court concluded that the films could fairly be considered obscene, "[a]ssuming that obscenity is established by a finding that the actors cavorted about in the nude indiscriminately," but held, nonetheless, that "the display of these films in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible."³ Since the issue did not arise in a statutory proceeding,

³ The precise holding of the trial court is not free from ambiguity. After pointing out that the films could be considered obscene, and that they still could not be suppressed in the absence of exposure to juveniles or unconsenting adults, the trial court concluded that "It is the judgment of this court that the films, even though they display the human body and the human personality in a most degrading fashion, are not obscene." It is not clear whether the trial court found that the films were not obscene in the sense that they were protected expression under the standards of *Roth v. United States*, 354 U. S. 476 (1957), and *Redrup v. New York*, 386 U. S. 767 (1967), or whether it used the expression "not obscene" as a term of art to indicate that the films could not be suppressed even though they were not protected under the *Roth-Redrup* standards. In any case, the Georgia Supreme Court viewed the trial court's opinion as holding that the films could not be suppressed, even if they were un-

the trial court was not required to pass upon the constitutionality of any state statute, on its face or as applied, in denying the injunction sought by the State.

The Supreme Court of Georgia unanimously reversed, reasoning that the lower court's reliance on *Stanley v. Georgia*, 394 U. S. 557 (1969), was misplaced in view of our subsequent decision in *United States v. Reidel*, 402 U. S. 351 (1971):

"In [*Reidel*] the Supreme Court expressly held that the government could constitutionally prohibit the distribution of obscene materials through the mails, even though the distribution be limited to willing recipients who state that they are adults, and, further, that the constitutional right of a person to possess obscene material in the privacy of his own home, as expressed in the *Stanley* case, does not carry with it the right to sell and deliver such material. . . . Those who choose to pass through the front door of the defendant's theatre and purchase a ticket to view the films and who certify thereby that they are more than 21 years of age are willing recipients of the material in the same legal sense as were those in the *Reidel* case, who, after reading the newspaper advertisements of the material, mailed an order to the defendant accepting his solicitation to sell them the obscene booklet involved there. That case clearly establishes once and for all that the sale and delivery of obscene material to willing adults is not protected under the first amendment." 228 Ga., at 346; 185 S. E. 2d, at 769-770.

The decision of the Georgia Supreme Court rested squarely on its conclusion that the State could constitutionally suppress these films even if they were dis-

protected expression, provided that they were not exhibited to juveniles or unconsenting adults.

played only to persons over the age of 21 who were aware of the nature of their contents and who had consented to viewing them. For the reasons set forth in this opinion, I am convinced of the invalidity of that conclusion of law, and I would therefore vacate the judgment of the Georgia Supreme Court. I have no occasion to consider the extent of state power to regulate the distribution of sexually oriented materials to juveniles or to unconsenting adults. Nor am I required, for the purposes of this appeal, to consider whether or not these petitioners had, in fact, taken precautions to avoid exposure of films to minors or unconsenting adults.

II

In *Roth v. United States*, 354 U. S. 476 (1957), the Court held that obscenity, although expression, falls outside the area of speech or press constitutionally protected under the First and Fourteenth Amendments against state or federal infringement. But at the same time we emphasized in *Roth* that "sex and obscenity are not synonymous," *id.*, at 487, and that matter which is sexually oriented but not obscene is fully protected by the Constitution. For we recognized that "[s]ex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." *Ibid.*⁴ *Roth* rested, in

⁴ "As to all such problems, this Court said in *Thornhill v. Alabama*, 310 U. S. 88, 101-102:

"The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. . . . Freedom of dis-

other words, on what has been termed a two-level approach to the question of obscenity.⁵ While much criticized,⁶ that approach has been endorsed by all but two members of this Court who have addressed the question since *Roth*. Yet our efforts to implement that approach demonstrate that agreement on the existence of something called "obscenity" is still a long and painful step from agreement on a workable definition of the term.

Recognizing that "the freedoms of expression . . . are vulnerable to gravely damaging yet barely visible encroachments," *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 66 (1963), we have demanded that "sensitive tools" be used to carry out the "separation of legitimate from illegitimate speech." *Speiser v. Randall*, 357 U. S. 513, 525 (1958). The essence of our problem in the obscenity area is that we have been unable to provide "sensitive tools" to separate obscenity from other sexually oriented but constitutionally protected speech, so that efforts to suppress the former do not spill over into the suppression of the latter. The attempt, as the late Mr. Justice Harlan observed, has only "produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication." *Interstate Circuit, Inc. v. Dallas*, 390 U. S. 676, 704-705. (1968) (separate opinion).

cussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." (Emphasis added.)"

Roth, 354 U. S., at 487-488. See also, e. g., *Thomas v. Collins*, 323 U. S. 516, 531 (1945) ("the rights of free speech and a free press are not confined to any field of human interest").

⁵See, e. g., Kalven, *The Metaphysics of the Law of Obscenity*, 1960 Sup. Ct. Rev. 1, 10-11; cf. *Beauharnais v. Illinois*, 343 U. S. 250 (1952).

⁶See, e. g., T. Emerson, *The System of Freedom of Expression* 487 (1970); Kalven, *supra*, n. 5; Comment, *More Ado About Dirty Books*, 75 Yale L. J. 1364 (1966).

To be sure, five members of the Court did agree in *Roth* that obscenity could be determined by asking "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U. S., at 489. But agreement on that test—achieved in the abstract and without reference to the particular material before the Court, see *id.*, at 481 n. 8—was, to say the least, short lived. By 1967 the following views had emerged: Mr. Justice Black and MR. JUSTICE DOUGLAS consistently maintained that government is wholly powerless to regulate any sexually oriented matter on the ground of its obscenity. See, e. g., *Ginzburg v. United States*, 383 U. S. 463, 476, 482 (1966) (dissenting opinions); *Jacobellis v. Ohio*, 378 U. S. 184, 196 (1964) (concurring opinion); *Roth*, 354 U. S., at 508 (dissenting opinion). Mr. Justice Harlan, on the other hand, believed that the Federal Government in the exercise of its enumerated powers could control the distribution of "hard-core" pornography, while the States were afforded more latitude to "[ban] any material which, taken as a whole, has been reasonably found in state judicial proceedings to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such material." *Jacobellis v. Ohio*, 378 U. S., at 204 (dissenting opinion. See also, e. g., *Ginzburg v. United States*, 383 U. S., at 493 (dissenting opinion); *A Quantity of Books v. Kansas*, 378 U. S. 205, 215 (1964) (dissenting opinion joined by Clark, J.); *Roth*, 354 U. S., at 496 (separate opinion). MR. JUSTICE STEWART regarded "hard-core" pornography as the limit of both federal and state power. See, e. g., *Ginzburg v. United States*, 383 U. S., at 497 (dissenting opinion); *Jacobellis v. Ohio*, 378 U. S., at 197 (concurring opinion).

The view that, until today, enjoyed the most, but not majority, support was an interpretation of *Roth* (and

not, as the Court suggests, a veering "sharply away from the *Roth* concept" and the articulation of "a new test of obscenity," *ante*, at 8) adopted by Mr. Chief Justice Warren, Mr. Justice Fortas, and the author of this opinion in *Memoirs v. Massachusetts*, 383 U. S. 413 (1966). We expressed the view that Federal or State Governments could control the distribution of material where "three elements . . . coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." *Id.*, at 418. Even this formulation, however, concealed differences of opinion. Compare *Jacobellis v. Ohio*, 378 U. S., at 192-195 (BRENNAN, J., joined by GOLDBERG, J.) (community standards national), with *id.*, at 200-201 (Warren, C. J., joined by Clark, J., dissenting) (community standards local).⁷ Moreover, it did not provide a definition covering all situations. See *Mishkin v. New York*, 383 U. S. 502 (1966) (prurient appeal defined in terms of a deviant sexual group); *Ginzburg v. United States*, *supra* ("pandering" probative evidence of obscenity in close cases). See also *Ginsberg v. New York*, 390 U. S. 629 (1968) (obscenity for juveniles). Nor, finally, did it ever command a majority of the Court. Aside from the other views described above, Mr. Justice Clark believed that "social importance" could only "be considered together with evidence that the material in question ap-

⁷ On the question of community standards see also *Hoyt v. Minnesota*, 390 U. S. 524 (1970) (BLACKMUN, J., joined by BURGER, C. J., and HARLAN, J., dissenting) (flexibility for state standards); *Cain v. Kentucky*, 397 U. S. 319 (1970) (BURGER, C. J., dissenting) (same); *Manual Enterprises v. Day*, 370 U. S. 478, 488 (1962) (HARLAN, J., joined by STEWART, J.) (national standards in context of federal prosecution).

peals to prurient interest and is patently offensive." *Memoirs v. Massachusetts*, 383 U. S., at 445 (dissenting opinion). Similarly, Mr. JUSTICE WHITE regarded "a publication to be obscene if its predominant theme appeals to the prurient interest in a manner exceeding customary limits of candor," *id.*, at 460-461 (dissenting opinion), and regarded "'social importance' . . . not [as] an independent test of obscenity, but [as] relevant only to determining the predominant prurient interest of the material" *Id.*, at 462.

In the face of this divergence of opinion the Court began the practice in 1967 in *Redrup v. New York*, 386 U. S. 767, of *per curiam* reversals of convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, deemed not to be obscene.⁴ This approach capped the attempt in *Roth* to separate all forms of sexually oriented expression into two categories—the one subject to full governmental suppression and the other beyond the reach of governmental regulation to the same extent as any other protected form of speech or press. Today a majority of the Court offers a slightly altered formulation of the basic *Roth* test, while leaving entirely unchanged the underlying approach.

III

Our experience with the *Roth* approach has certainly taught us that the outright suppression of obscenity

⁴ No fewer than 31 cases have been disposed of in this fashion. Aside from the three cases reversed in *Redrup*, these are found at 388 U. S. 440, 441, 442, 443, 444, 446, 447, 449, 452, 453, 454 (1967); 389 U. S. 47, 48, 50, 59, 573, 578 (1967-1968); 390 U. S. 340 (1968); 392 U. S. 655 (1968); 397 U. S. 319 (1970); 398 U. S. 278, 434 (1970); 399 U. S. 524 (1970); 401 U. S. 1006 (1971); 402 U. S. 938 (1971); 404 U. S. 806, 988 (1971) (two decisions reported at 988).

cannot be reconciled with the fundamental principles of the First and Fourteenth Amendments. For we have failed to formulate a standard that sharply distinguishes protected from unprotected speech, and out of necessity, we have resorted to the *Redrup* approach, which resolves cases as between the parties, but offers only the most obscure guidance to legislation, adjudication by other courts, and primary conduct. By disposing of cases through summary reversal or denial of certiorari we have deliberately and effectively obscured the rationale underlying the decision. It comes as no surprise that judicial attempts to follow our lead conscientiously have often ended in hopeless confusion.

Of course, the vagueness problem would be largely of our own creation if it stemmed primarily from our failure to reach a consensus on any one standard. But after 15 years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments, on the one hand, and on the other the asserted state interest in regulating the dissemination of certain sexually oriented materials. Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as "prurient interest," "patent offensiveness," "serious literary value," and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncracies of the person defining them. Although we have assumed that obscenity does exist and that we "know it when [we] see it," *Jacobellis v. Ohio*, 378 U. S. 184, 197 (1964) (STEWART, J., concurring), we are manifestly unable to

describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech.

We have more than once previously acknowledged that "constitutionally protected expression . . . is often separated from obscenity only by a dim and uncertain line." *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 66 (1963). See also, *e. g.*, *Mishkin v. New York*, 383 U. S., at 511. Added to the "perhaps inherent residual vagueness" of each of the current multitude of standards, *Ginzburg v. United States*, 383 U. S. 463, 475 n. 19 (1966), is the further complication that the obscenity of any particular item may depend upon nuances of presentation and the context of its dissemination. See *id.* *Redrup* itself suggested that obtrusive exposure to unwilling individuals, distribution to juveniles, and "pandering" may also bear upon the determination of obscenity. See 386 U. S., at 769. As Mr. Chief Justice Warren stated in a related vein, obscenity is a function of the circumstances of its dissemination:

"It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character." *Roth*, 354 U. S., at 495 (concurring opinion). See also, *e. g.*, *Jacobellis v. Ohio*, 378 U. S. 184, 201 (1964) (dissenting opinion); *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, 445-446 (1957) (dissenting opinion).

I need hardly point out that the factors which must be taken into account are judgmental and can only be applied on "a case-by-case, sight-by-sight" basis. *Mish-*

kin v. *New York*, 383 U. S., at 516 (Black, J., dissenting). These considerations suggest that no one definition, no matter how precisely or narrowly drawn, can possibly suffice for all situations, or carve out fully suppressable expression from all media without also creating a substantial risk of encroachment upon the guarantees of the Due Process Clause and the First Amendment.*

* Although I did not join the opinion of the Court in *Stanley v. Georgia*, 394 U. S. 557 (1969), I am now inclined to agree that "the Constitution protects the right to receive information and ideas," and that "[t]his right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society." *Id.*, at 564. See *Martin v. City of Struthers*, 319 U. S. 141, 143 (1943); *Winters v. New York*, 333 U. S. 507, 510 (1948); *Lamont v. Postmaster General*, 381 U. S. 301, 307-308 (1965) (concurring opinion). This right is closely tied, as *Stanley* recognized, to "the right to be free, except in very limited circumstances, from unwarranted governmental intrusions into one's privacy." 394 U. S., at 564. See *Griswold v. Connecticut*, 381 U. S. 479 (1965); *Olmstead v. United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting). It is similarly related to "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child," *Eisenstadt v. Baird*, 405 U. S. 438, 453 (1972), and the right to exercise "autonomous control over the development and expression of one's intellect, interests, tastes, and personality." *Doe v. Bolton*, 410 U. S. 179, 211 (1973) (DOUGLAS, J., concurring). It seems to me that the recognition of these intertwining rights calls in question the validity of the two-level approach recognized in *Roth*. After all, if a person has the right to receive information without regard to its social worth—that is, without regard to its obscenity—then it would seem to follow that a State could not constitutionally punish one who undertakes to provide this information to a *willing, adult recipient*. See *Eisenstadt v. Baird*, 405 U. S., at 443-446. In any event, I need not rely on this line of analysis or explore all of its possible ramifications, for there is available a narrower basis on which to rest this decision. Whether or not a class of "obscene" and thus entirely unprotected speech does exist, I am forced to conclude that the class is incapable of definition with sufficient clarity

The vagueness of the standards in the obscenity area produces a number of separate problems, and any improvement must rest on an understanding that the problems are to some extent distinct. First, a vague statute fails to provide adequate notice to persons who are engaged in the type of conduct that the statute could be thought to proscribe. The Due Process Clause of the Fourteenth Amendment requires that all criminal laws provide fair notice of "what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U. S. 451, 453 (1939); *Connally v. General Construction Co.*, 269 U. S. 385 (1926). In the service of this general principle we have repeatedly held that the definition of obscenity must provide adequate notice of exactly what is prohibited from dissemination. See, e. g., *Rabe v. Washington*, 405 U. S. 313 (1972); *Interstate Circuit, Inc. v. Dallas* 390 U. S. 676 (1968); *Winters v. New York*, 333 U. S. 507 (1948). While various tests have been upheld under the Due Process Clause, see *Ginsberg v. New York*, 390 U. S. 629, 643 (1968); *Mishkin v. New York*, 383 U. S. 502, 506-507 (1966); *Roth v. United States*, 354 U. S. 476, 491-492 (1957), I have grave doubts that any of those tests could be sustained today. For I know of no satisfactory answer to the assertion by Mr. Justice Black, "after the fourteen separate opinions handed down" in the trilogy of cases decided in 1966, that "no person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the area of 'obscenity.' . . ." *Ginsburg v. United States* 383 U. S., at 480-481 (dissenting opinion). See also

to withstand attack on vagueness grounds. Accordingly, it is on principles of the void-for-vagueness doctrine that this opinion exclusively relies.

the statement of Mr. Justice Harlan in *Interstate Circuit, Inc. v. Dallas*, 390 U. S., at 707 (separate opinion). As Chief Justice Warren pointed out, "[T]he constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harriss*, 347 U. S. 612, 617 (1954). In this context, even the most painstaking efforts to determine in advance whether certain sexually oriented expression is obscene must inevitably prove unavailing. For the insufficiency of the notice compels persons to guess not only whether their conduct is covered by a criminal statute, but also whether their conduct falls within the constitutionally permissible reach of the statute. The resulting level of uncertainty is utterly intolerable, not alone because it makes "[b]ookselling . . . a hazardous profession," *Ginsberg v. New York*, 390 U. S., at 674 (Fortas, J., dissenting), but as well because it invites arbitrary and erratic enforcement of the law. See, e. g., *Papachristou v. City of Jacksonville*, 405 U. S. 156 (1972); *Gregory v. City of Chicago*, 394 U. S. 111, 120 (1969) (Black, J., concurring); *Niemotko v. Maryland*, 340 U. S. 268 (1951); *Cantwell v. Connecticut*, 310 U. S. 296, 308 (1940); *Thornhill v. Alabama*, 310 U. S. 88 (1940).

In addition to problems that arise when any criminal statute fails to afford fair notice of what it forbids, a vague statute in the areas of speech and press creates a second level of difficulty. We have indicated that "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of

ideas may be the loser." ¹⁰ *Smith v. California*, 361 U. S. 147, 151 (1959). That proposition draws its strength from our recognition that

"[t]he fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar" *Roth*, 354 U. S., at 488.¹¹

To implement this general principle, and recognizing the inherent vagueness of any definition of obscenity, we have held that the definition of obscenity must be

¹⁰ In this regard, the problems of vagueness and overbreadth are, plainly, closely intertwined. See *NAACP v. Button*, 371 U. S. 415, 432-433 (1963); Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 845 (1970). Cf. *post*, at 21-22.

¹¹ See also *Speiser v. Randall*, 357 U. S. 513 (1958); cf. *Barenblatt v. United States*, 360 U. S. 109, 137-138 (Black, J., dissenting): "This Court . . . has emphasized that the 'vice of vagueness' is especially pernicious where legislative power over an area involving speech, press, petition and assembly is involved. . . . For a statute broad enough to support infringement of speech, writings, thoughts and public assemblies, against the unequivocal command of the First Amendment necessarily leaves all persons to guess just what the law really means to cover, and fear of a wrong guess inevitably leads people to forego the very rights the Constitution sought to protect above all others. Vagueness becomes even more intolerable in this area if one accepts, as the Court today does, a balancing test to decide if First Amendment rights shall be protected. It is difficult at best to make a man guess—at the penalty of imprisonment—whether a court will consider the State's need for certain information superior to society's interest in unfettered freedom. It is unconscionable to make him choose between the right to keep silent and the need to speak when the statute supposedly establishing the 'state's interest' is too vague to give him guidance." (Citations omitted.)

drawn as narrowly as possible so as to minimize the interference with protected expression. Thus, in *Roth* we rejected the test of *Regina v. Hicklen*, [1868] L. R. 3 Q. B. 360, that "[judged] obscenity by the effect of isolated passages upon the most susceptible persons." That test, we held in *Roth*, "might well encompass material legitimately treating with sex" 354 U. S., at 489. Cf. *Mishkin v. New York*, 383 U. S. 502, 509 (1966). And we have supplemented the *Roth* standard with additional tests in an effort to hold in check the corrosive effect of vagueness on the guarantees of the First Amendment.¹² We have held, for example, that "a State is not free to adopt whatever procedures it pleases for dealing with obscenity" *Marcus v. Search Warrant*, 367 U. S. 717, 731 (1961). "Rather, the First Amendment requires that procedures be incorporated that 'ensure against the curtailment of constitutionally protected expression'" *Blount v. Rizzi*, 400 U. S. 410, 416 (1971), quoting from *Bantam Books, Inc., v. Sullivan*, 372 U. S. 58, 66 (1963). See generally *Rizzi*, 400 U. S., at 417; *United States v. Thirty-seven Photographs*, 402 U. S. 363, 367-375 (1971); *Lee Art Theatre, Inc. v. Virginia*, 392 U. S. 636 (1968); *Freedman v. Maryland*, 380 U. S. 51, 58-60 (1965); *A Quantity of Books v. Kansas*, 378 U. S. 205 (1964) (plurality opinion).

Similarly, we have held that a State cannot impose criminal sanctions for the possession of obscene material absent proof that the possessor had knowledge of the contents of the material. *Smith v. California*, 361 U. S. 147 (1959). "Proof of scienter" is necessary "to avoid the hazard of self-censorship of constitutionally

¹² Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 885-886 and n. 158 (1970) ("Thus in the area of obscenity the overbreadth doctrine operates interstitially, when no line of privilege is apposite or yet to be found, to control the impact of schemes designed to curb distribution of unprotected material.").

protected material and to compensate for the ambiguities inherent in the definition of obscenity." *Mishkin v. New York*, 383 U. S. 502, 511 (1966); *Ginsberg v. New York*, 390 U. S. 629, 644-645 (1968). In short,

"[t]he objectionable quality of vagueness and overbreadth . . . [is] the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. Cf. *Marcus v. Search Warrant*, 367 U. S. 717, 733. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Cf. *Smith v. California*, [361 U. S.], at 151-154; *Speiser v. Randall*, 357 U. S. 513, 526. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. *Cantwell v. Connecticut*, 310 U. S. 296, 311." *NAACP v. Button*, 371 U. S. 415, 432-433 (1963).

The problems of fair notice and chilling protected speech are very grave standing alone. But it does not detract from their importance to recognize that a vague statute in this area creates a third, although admittedly more subtle, set of problems. These problems concern the institutional stress that inevitably results where the line separating protected from unprotected speech is excessively vague. In *Roth* we conceded that "there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls" 354 U. S., at 491-492. Our subsequent experience demonstrates that almost every case is "marginal." And since the "margin" marks the point of separation between protected and unprotected speech, we are left with a system in which almost every ob-

scenity case presents a constitutional question of exceptional difficulty. "The suppression of a particular writing or other tangible form of expression is . . . an *individual* matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for *itself* whether the attacked expression is suppressable within constitutional standards." *Roth*, 354 U. S., at 497 (separate opinion of Harlan, J.).

Examining the rationale, both explicit and implicit, of our vagueness decisions, one commentator has viewed these decisions as an attempt by the Court to establish an "insulating buffer-zone of added protection at the peripheries of several of the Bill of Rights freedoms." The buffer-zone enables the Court to fend off legislative attempts "to pass to the courts—and ultimately to the Supreme Court—the awesome task of making case by case at once the criminal and the constitutional law." Thus,

"[b]ecause of the Court's limited power to re-examine fact on a cold record, what appears to be going on in the administration of the law must be forced, by restrictive procedures, to reflect what is really going on; and because of the impossibility, through sheer volume of cases, of the Court's effectively policing law administration case by case, these procedures must be framed to assure, as well as procedures can assure, a certain overall *probability* of regularity." Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, 75, 81, 89 (1960) (emphasis in original).

As a result of our failure to define standards with predictable application to any given piece of material, there is no probability of regularity in obscenity decisions by state and lower federal courts. That is not

to say that these courts have performed badly in this area or paid insufficient attention to the principles we have established. The problem is, rather, that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so. The number of obscenity cases on our docket gives ample testimony to the burden that has been placed upon this Court.

But the sheer number of the cases does not define the full extent of the institutional problem. For quite apart from the number of cases involved and the need to make a fresh constitutional determination in each case, we are tied to the "absurd business of perusing and viewing the miserable stuff that pours into the Court" *Interstate Circuit, Inc. v. Dallas*, 390 U. S. 676, 707 (1968) (Harlan, J., dissenting). While the material may have varying degrees of social importance, it is hardly a source of edification to the members of this Court who are compelled to view it before passing on its obscenity. Cf. *Mishkin v. New York*, 383 U. S. 502, 516-517 (1966) (Black, J., dissenting).

Moreover, we have managed the burden of deciding scores of obscenity cases by relying on *per curiam* reversals or denials of certiorari—a practice which conceals the rationale of decision and gives at least the appearance of arbitrary action by this Court. See *Bloss v. Dykema*, 398 U. S. 278 (1970) (Harlan, J., dissenting). More important, no less than the procedural schemes struck down in such cases as *Blount v. Rizzi*, 400 U. S. 410 (1971), and *Freedman v. Maryland*, 380 U. S. 51 (1965), the practice effectively censors protected expression by leaving lower court determinations of obscenity intact even though the status of the allegedly obscene material is entirely unsettled until final review here. In addition, the uncertainty of the standards creates a continuing source of tension between state and federal courts, since

the need for an independent determination by this Court seems to render superfluous even the most conscientious analysis by state tribunals. And our inability to justify our decisions with a persuasive rationale—or indeed, any rationale at all—necessarily creates the impression that we are merely second-guessing state court judges.

The severe problems arising from the lack of fair notice, from the chill on protected expression, and from the stress imposed on the state and federal judicial machinery persuade me that a significant change in direction is urgently required. I turn, therefore, to the alternatives that are now open.

IV

1. The approach requiring the smallest deviation from our present course would be to draw a new line between protected and unprotected speech, still permitting the States to suppress all material on the unprotected side of the line. In my view, clarity cannot be obtained pursuant to this approach except by drawing a line that resolves all doubts in favor of state power and against the guarantees of the First Amendment. We could hold, for example, that any depiction or description of human sexual organs, irrespective of the manner or purpose of the portrayal, is outside the protection of the First Amendment and therefore open to suppression by the States. That formula would, no doubt, offer much fairer notice of the reach of any state statute drawn at the boundary of the State's constitutional power. And it would also, in all likelihood, give rise to a substantial probability of regularity in most judicial determinations under the standard. But such a standard would be appallingly overbroad, permitting the suppression of a vast range of literary, scientific, and artistic masterpieces. Neither the First Amendment nor any

free community could possibly tolerate such a standard. Yet short of that extreme it is hard to see how any choice of words could reduce the vagueness problem to tolerable proportions, so long as we remain committed to the view that some class of materials is subject to outright suppression by the State.

2. The alternative adopted by the Court today recognizes that a prohibition against any depiction or description of human sexual organs could not be reconciled with the guarantees of the First Amendment. But the Court does retain the view that certain sexually oriented material can be considered obscene and therefore unprotected by the First and Fourteenth Amendments. To describe that unprotected class of expression, the Court adopts a restatement of the *Roth-Memoirs* definition of obscenity: "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value." *California v. Miller*, ante, at 10. In apparent illustration of "sexual conduct," as that term is used in the test's second element, the Court identifies "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," and "(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of genitals." *Id.*, at 11.

The differences between this formulation and the three-pronged *Memoirs* test are, for the most part, academic.¹³

¹³ While the Court's modification of the *Memoirs* test is small, it should still prove sufficient to invalidate virtually every state

The first element of the Court's test is virtually identical to the *Memoirs* requirement that "the dominant theme of the material taken as a whole [must appeal] to a prurient interest in sex." 383 U. S., at 418. Whereas the second prong of the *Memoirs* test demanded that the material be "patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters," *ibid.*, the test adopted today requires that the material describe, "in a patently offensive way, sexual conduct specifically defined by the applicable state law." The third component of the *Memoirs* test is that the material must be "utterly without redeeming social value." *Ibid.* The Court's rephrasing requires that the work, taken as a whole, must be proved to lack "serious literary, artistic, political, or scientific value."

The Court evidently recognizes that difficulties with the *Roth* approach necessitate a significant change of direction. But the Court does not describe its understanding of those difficulties, nor does it indicate how the restatement of the *Memoirs* test is in any way responsive to the problems that have arisen. In my view,

law relating to the suppression of obscenity. For under the Court's restatement, a statute must specifically enumerate certain forms of sexual conduct, the depiction of which is to be prohibited. It seems highly doubtful to me that state courts will be able to construe state statutes so as to incorporate a carefully itemized list of various forms of sexual conduct, and thus to bring them into conformity with the Court's requirements. Cf. *Blount v. Rizzi*, 400 U. S. 410, 419 (1971). The statutes of at least one State should, however, escape the wholesale invalidation. Oregon has recently revised its statute to prohibit only the distribution of obscene materials to juveniles or unconsenting adults. The enactment of this principle is, of course, a choice constitutionally open to every State even under the Court's decision. See Oregon Laws 1971, c. 743, Art. 29.

the restatement leaves unresolved the very difficulties that compel our rejection of the underlying *Roth* approach, while at the same time contributing substantial difficulties of its own. The modification of the *Memoirs* test may prove sufficient to jeopardize the analytic underpinnings of the entire scheme. And today's restatement will likely have the effect, whether or not intended, of permitting far more sweeping suppression of sexually oriented expression, including expression that would almost surely be held protected under our current formulation.

Although the Court's restatement substantially tracks the three-part test announced in *Memoirs v. Massachusetts, supra*, it does purport to modify the "social value" component of the test. Instead of requiring, as did *Roth* and *Memoirs*, that state suppression be limited to materials utterly lacking in social value, the Court today permits suppression if the government can prove that the materials lack "serious literary, artistic, political or scientific value." But the definition of "obscenity" as expression utterly lacking in social importance is the key to the conceptual basis of *Roth* and our subsequent opinions. In *Roth* we held that certain expression is obscene, and thus outside the protection of the First Amendment, precisely *because* it lacks even the slightest redeeming social value. See *Roth v. United States, supra*, at 484-485; ¹⁴ *Jacobellis v. Ohio*, 378 U. S., at 191; *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 920, 383 P. 2d 152, 165, 31

¹⁴ "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." *Roth v. United States, supra*, at 484.

Cal. Rptr. 800, 813 (1963); cf. *New York Times v. Sullivan*, 376 U. S. 254 (1964); *Garrison v. Louisiana*, 379 U. S. 64, 75 (1964); *Chaplinsky v. New Hampshire*, 315 U. S. 568, 572 (1942); Kalven, *The Metaphysics of the Law of Obscenity*, 1960 Sup. Ct. L. Rev. 1. The Court's approach necessarily assumes that some works will be deemed obscene—even though they clearly have some social value—because the State was able to prove that the value, measured by some unspecified standard, was not sufficiently "serious" to warrant constitutional protection. That result is not merely inconsistent with our holding in *Roth*; it is nothing less than a rejection of the fundamental First Amendment premises and rationale of the *Roth* opinion and an invitation to widespread suppression of sexually oriented speech. Before today, the protections of the First Amendment have never been thought limited to expressions of serious literary or political value. See *Gooding v. Wilson*, 405 U. S. 518 (1972); *Cohen v. California*, 403 U. S. 15, 25-26 (1971); *Terminiello v. City of Chicago*, 337 U. S. 1, 4-5 (1949).

Although the Court concedes that "*Roth* presumed 'obscenity' to be 'utterly without redeeming social value,'" it argues that *Memoirs* produced "a drastically altered test that called on the prosecution to prove a negative, i. e., that the material was 'utterly without redeeming social value'—a burden virtually impossible to discharge under our criminal standards of proof."¹³ One should hardly need to point out that under the third component of the Court's test the prosecution is still required to "prove a negative"—i. e., that the material lacks serious literary, artistic, political, or scientific value. Whether it will be easier to prove that material lacks "serious" value than to prove that it lacks any value at all remains, of course, to be seen.

¹³ *California v. Miller*, ante, at 7.

In any case, even if the Court's approach left undamaged the conceptual framework of *Roth*, and even if it clearly barred the suppression of works with at least some social value, I would nevertheless be compelled to reject it. For it is beyond dispute that the approach can have no ameliorative impact on the cluster of problems that grow out of the vagueness of our current standards. Indeed, even the Court makes no argument that the reformulation will provide fairer notice to booksellers, theatre owners, and the reading and viewing public. Nor does the Court contend that the approach will provide clearer guidance to law enforcement officials or reduce the chill on protected expression. Nor, finally, does the Court suggest that the approach will mitigate to the slightest degree the institutional problems that have plagued this Court and the State and Federal Judiciary as a direct result of the uncertainty inherent in any definition of obscenity.

Of course, the Court's restated *Roth* test does limit the definition of obscenity to depictions of physical conduct and explicit sexual acts. And that limitation may seem, at first glance, a welcome and clarifying addition to the *Roth-Memoirs* formula. But just as the agreement in *Roth* on an abstract definition of obscenity gave little hint of the extreme difficulty that was to follow in attempting to apply that definition to specific material, the mere formulation of a "physical conduct" test is no assurance that it can be applied with any greater facility. The Court does not indicate how it would apply its test to the materials involved in *California v. Miller*, *ante*, and we can only speculate as to its application. But even a confirmed optimist could find little realistic comfort in the adoption of such a test. Indeed, the valiant attempt of one lower federal court to draw the constitutional line at depictions of explicit sexual conduct seems to belie any suggestion that this approach marks the road

to clarity.¹⁶ The Court surely demonstrates little sensitivity to our own institutional problems, much less the other vagueness-related difficulties, in establishing a system that requires us to consider whether a description of human genitals is sufficiently "lewd" to deprive it of constitutional protection; whether a sexual act is "ultimate"; whether the conduct depicted in materials before us fits within one of the categories of conduct whose depiction the state or federal governments have attempted to suppress; and, a host of equally pointless inquiries. In addition, adoption of such a test does not, presumably, obviate the need for consideration of the nuances of presentation of sexually oriented material, yet it hardly clarifies the application of those opaque but important factors.

If the application of the "physical conduct" test to pictorial material is fraught with difficulty, its application to textual material carries the potential for extraordinary abuse. Surely we have passed the point where the mere written description of sexual conduct is deprived of First Amendment protection. Yet the test offers no guidance to us, or anyone else, in determining which written descriptions of sexual conduct are protected, and which are not.

Ultimately, the reformulation must fail because it still leaves in this Court the responsibility of determining in each case whether the materials are protected by the First Amendment. The Court concedes that even under its restated formulation, the First Amendment interests at stake require "appellate courts to conduct an independent

¹⁶ *Huffman v. United States*, — U. S. App. D. C. —, 470 F. 2d 386 (1971). The test apparently requires an effort to distinguish between "singles" and "duals," between "erect penises" and "semi-erect penises," and between "ongoing sexual activity" and "imminent sexual activity."

review of constitutional claims when necessary," *California v. Miller*, ante, at 10, citing Mr. Justice Harlan's opinion in *Roth*, where he stated, "I do not understand how the Court can resolve the constitutional problems before it without making its own independent judgment upon the character of the material upon which these convictions were based." 354 U. S., at 498. Thus, the Court's new formulation will not relieve us of "the awesome task of making case by case at once the criminal and the constitutional law."¹⁷ And the careful efforts of state and lower federal courts to apply the standard will remain an essentially pointless exercise, in view of the need for an ultimate decision by this Court. In addition, since the status of sexually oriented material will necessarily remain in doubt until final decision by this Court, the new approach will not diminish the chill on protected expression that derives from the uncertainty of the underlying standard. I am convinced that a definition of obscenity in terms of physical conduct cannot provide sufficient clarity to afford fair notice, to avoid a chill on protected expression, and to minimize the institutional stress, so long as that definition is used to justify the outright suppression of any material that is asserted to fall within its terms.

3. I have also considered the possibility of reducing our own role, and the role of appellate courts generally, in determining whether particular matter is obscene. Thus, we might conclude that juries are best suited to determine obscenity *vel non* and that jury verdicts in this area should not be set aside except in cases of extreme departure from prevailing standards. Or, more generally, we might adopt the position that where a lower federal or state court has conscientiously applied the constitu-

¹⁷ Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 81 (1960), quoted at p. 19, *supra*.

tional standard, its finding of obscenity will be no more vulnerable to reversal by this Court than any finding of fact. Cf. *Interstate Circuit v. Dallas*, 390 U. S. 676, 706-707 (1968) (separate opinion of Harlan, J.). While the point was not clearly resolved prior to our decision in *Redrup v. New York*, *supra*,¹⁸ it is implicit in that decision that the First Amendment requires an independent review by appellate courts of the constitutional fact of obscenity.¹⁹ That result is required by principles applicable to the obscenity issue no less than to any other area involving free expression, see, e. g., *New York Times Co. v. Sullivan*, 376 U. S. 254, 284-285 (1964), or other constitutional right.²⁰ In any event, even if the Constitution would permit us to refrain from judging for ourselves the alleged obscenity of particular materials, that approach would solve at best only a small part of our problem. For while it would mitigate

¹⁸ Compare *Ginsberg v. New York*, 390 U. S. 629, 672 (1968) (Fortas, J., dissenting), *Jacobellis v. Ohio*, 378 U. S. 184, 187-190 (1964) (BRENNAN, J., joined by Goldberg, J.), *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 488 (Harlan, J., joined by STEWART, J.), and *Kingsley Pictures Corp. v. Regents*, 360 U. S. 684, 696-697 (Frankfurter, J., concurring), 708 (Harlan, J., joined by Frankfurter, J., and Whittaker, J., concurring) (1959), with *Jacobellis v. Ohio*, 378 U. S., at 202-203 (Warren, C. J., joined by Clark, J., dissenting), *Roth*, 354 U. S., at 492 n. 30, and *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, 448 (1957) (BRENNAN, J., dissenting). See also *Walker v. Ohio*, 398 U. S. 434 (1970) (BURGER, C. J., dissenting).

¹⁹ Mr. Justice Harlan, it bears noting, considered this requirement critical for review of not only federal but state convictions, despite his view that the States were accorded more latitude than the Federal Government in defining obscenity. See, e. g., *Roth*, 354 U. S., at 502-503 (separate opinion).

²⁰ See generally *Culombe v. Connecticut*, 367 U. S. 568, 603-606 (1961) (opinion of Frankfurter, J.); cf. *Crowell v. Benson*, 285 U. S. 22, 54-65 (1932); *Ng Fung Ho v. White*, 259 U. S. 276, 284-285 (1922).

the institutional stress produced by the *Roth* approach, it would neither offer nor produce any cure for the other vices of vagueness. Far from providing a clearer guide to permissible primary conduct, the approach would inevitably lead to even greater uncertainty and the consequent due process problems of fair notice. And the approach would expose much protected, sexually oriented expression to the vagaries of jury determinations. Cf. *Herndon v. Lowry*, 301 U. S. 242, 263 (1937). Plainly, the institutional gain would be more than offset by the unprecedented infringement of First Amendment rights.

4. Finally, I have considered the view, urged so forcefully since 1957 by our Brothers Black and DOUGLAS, that the First Amendment bars the suppression of any sexually oriented expression. That position would effect a sharp reduction, although perhaps not a total elimination, of the uncertainty that surrounds our current approach. Nevertheless, I am convinced that it would achieve that desirable goal only by stripping the States of power to an extent that cannot be justified by the commands of the Constitution, at least so long as there is available an alternative approach that strikes a better balance between the guarantee of free expression and the States' legitimate interests.

V

Our experience since *Roth* requires us not only to abandon the effort to pick out obscene materials on a case-by-case basis, but also to reconsider a fundamental postulate of *Roth*: that there exists a definable class of sexually oriented expression that may be totally suppressed by the Federal and State Governments. Assuming that such a class of expression does in fact exist,²¹ I am forced to conclude that the concept

²¹ See n. 9, *supra*.

of "obscenity" cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a by-product of the attempt to suppress unprotected speech, and to avoid very costly institutional harms. Given these inevitable side-effects of state efforts to suppress what is assumed to be *unprotected* speech, we must scrutinize with care the state interest that is asserted to justify the suppression. For in the absence of some very substantial interest in suppressing such speech, we can hardly condone the ill-effects that seem to flow inevitably from the effort.²²

Obscenity laws have a long history in this country. Most of the States that had ratified the Constitution by 1792 punished the related crime of blasphemy or profanity despite the guarantees of free expression in their constitutions, and Massachusetts expressly prohibited the "composing, writing, printing or publishing of any filthy, obscene or profane song, pamphlet, libel or mock-sermon, in imitation of preaching, or any other part of divine

²² Cf. *United States v. O'Brien*, 391 U. S. 367, 376-377 (1968):

"This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." (Footnotes omitted.) See also *Speiser v. Randall*, 357 U. S. 513 (1958).

worship." Province Laws, 1711-1712, ch. 6, § 19. In 1815 the first reported obscenity conviction was obtained under the common law of Pennsylvania. See *Commonwealth v. Sharpless*, 2 S. & R. 91. A conviction in Massachusetts under its common law and colonial statute followed six years later. See *Commonwealth v. Holmes*, 17 Mass. 335 (1821). In 1821 Vermont passed the first state law proscribing the publication or sale of "lewd or obscene" material, Laws of Vermont, 1824, ch. XXIII, No. 1, § 23, and federal legislation barring the importation of similar matter appeared in 1842. See Customs Law of 1842, § 28, 5 Stat. 566. Although the number of early obscenity laws was small and their enforcement exceedingly lax, the situation significantly changed after about 1870 when Federal and State Governments, mainly as a result of the efforts of Anthony Comstock, took an active interest in the suppression of obscenity. By the end of the 19th Century at least 30 States had some type of general prohibition on the dissemination of obscene materials, and by the time of our decision in *Roth* no State was without some provision on the subject. The Federal Government meanwhile had enacted no fewer than 20 obscenity laws between 1842 and 1956. See *Roth*, 354 U. S., at 482-483, 485; Report of the Commission on Obscenity and Pornography 300-301 (1970).

This history caused us to conclude in *Roth* "that the unconditional phrasing of the First Amendment [that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."] was not intended to protect every utterance." 354 U. S., at 483. It also caused us to hold, as numerous prior decisions of this Court had assumed, see *id.*, at 481, that obscenity could be denied the protection of the First Amendment and hence suppressed because it is a form of expression "utterly without redeeming social importance," *id.*, at

484, as "mirrored in the universal judgment that [it] should be restrained" *Id.*, at 485.

Because we assumed—incorrectly, as experience has proven—that obscenity could be separated from other sexually oriented expression without significant costs either to the First Amendment or to the judicial machinery charged with the task of safeguarding First Amendment freedoms, we had no occasion in *Roth* to probe the asserted state interest in curtailing unprotected, sexually oriented speech. Yet as we have increasingly come to appreciate the 'vagueness' of the concept of obscenity, we have begun to recognize and articulate the state interests at stake. Significantly, in *Redrup v. New York*, *supra*, where we set aside findings of obscenity with regard to three sets of material, we pointed out that

"[i]n none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See *Prince v. Massachusetts*, 321 U. S. 158; cf. *Butler v. Michigan*, 352 U. S. 380. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. *Breard v. Alexandria*, 341 U. S. 622; *Public Utilities Comm'n v. Pollak*, 343 U. S. 451. And in none was there evidence of the sort of 'pandering' which the Court found significant in *Ginzburg v. United States*, 383 U. S. 463." 386 U. S., at 769.

See *Rowan v. Post Office Dept.*, 397 U. S. 728 (1970); *Stanley v. Georgia*, 394 U. S. 557, 567 (1969).²³

²³ See also *Rabe v. Washington*, 405 U. S. 313, 317 (1972) (concurring opinion); *United States v. Reidel*, 402 U. S. 351, 360-362 (1971) (separate opinion); *Ginsberg v. New York*, 390 U. S. 629 (court opinion), 674-675 (dissenting opinion) (1968); *Redmond v. United States*, 384 U. S. 264, 265 (1966); *Ginsburg v. United States*, 383

The opinions in *Redrup* and *Stanley v. Georgia* reflected our emerging view that the state interests in protecting children and in protecting unconsenting adults may stand on a different footing from the other asserted state interests. It may well be, as one commentator has argued, that "exposure to [erotic material] is for some persons an intense emotional experience. A communication of this nature, imposed upon a person contrary to his wishes, has all the characteristics of a physical assault. . . . [And it] constitutes an invasion of his privacy" ²⁴ But cf. *Cohen v. California*, 403 U. S. 15, 21-22 (1971). Similarly, if children are "not possessed of that full capacity for individual choice which is the presupposition of the First Amendment guarantees," *Ginsberg v. New York*, 390 U. S., at 649-650 (STEWART, J., concurring), then the State may have a substantial interest in precluding the flow of obscene materials even to consenting juveniles.²⁵ But cf. *Ginsberg v. New York*, 390 U. S., at 673-674 (Fortas, J., dissenting).

But whatever the strength of the state interests in protecting juveniles and unconsenting adults from exposure to sexually oriented materials, those interests cannot be asserted in defense of the holding of the Georgia Supreme Court in this case. That court assumed for the purposes of its decision that the films in issue were exhibited only to persons over the age of 21 who viewed them willingly and with prior knowledge of the nature of their contents. And on that assumption

U. S. 436 (court opinion), 498 n. 1 (dissenting opinion) (1966); *Memoirs v. Massachusetts*, 383 U. S. 413, 421 n. 8 (plurality opinion); *Jacobellis v. Ohio*, 378 U. S. 184, 195 (opinion of BRENNAN, J., joined by Goldberg, J.), 201 (dissenting opinion) (1964). See also Report of the Commission on Obscenity and Pornography 300-301 (1970) (focus of early obscenity laws on protection of youth).

²⁴ T. Emerson, *The System of Freedom of Expression* 496 (1970).

²⁵ See *ibid.*

the state court held that the films could still be suppressed. The justification for the suppression must be found, therefore, in some independent interest in regulating the reading and viewing habits of consenting adults.

At the outset it should be noted that virtually all of the interests that might be asserted in defense of suppression, laying aside the special interests associated with distribution to juveniles and unconsenting adults, were also posited in *Stanley v. Georgia, supra*, where we held that the State could not make the "mere private possession of obscene material a crime." *Id.*, at 568. That decision presages the conclusions I reach here today.

In *Stanley* we pointed out that "[t]here appears to be little empirical basis for" the assertion that "exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence." *Id.*, at 566 and n. 9.²⁶ In any event, we added that "if the State is only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that '[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for

²⁶ Indeed, since *Stanley* was decided, the President's Commission on Obscenity and Pornography has concluded:

"In sum, empirical research designed to clarify the question has found no evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal behavior among youth or adults. The Commission cannot conclude that exposure to erotic materials is a factor in the causation of sex crime or sex delinquency." Report of the Commission on Obscenity and Pornography 27 (1970) (footnote omitted).

To the contrary, the Commission found that "[o]n the positive side, explicit sexual materials are sought as a source of entertainment and information by substantial numbers of American adults. At times, these materials also appear to serve to increase and facilitate constructive communication about sexual matters within marriage." *Id.*, at 53.

violations of the law’ *Whitney v. California*, 274 U. S. 357, 378 (1927) (Brandeis, J., concurring).” *Id.*, at 566–567.

Moreover, in *Stanley* we rejected as “wholly inconsistent with the philosophy of the First Amendment,” *id.*, at 566, the notion that there is a legitimate state concern in the “control [of] the moral content of a person’s thoughts,” *id.*, at 565, and we held that a State “cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts.” *Id.*, at 566. That is not to say, of course, that a State must remain utterly indifferent to—and take no action bearing on—the morality of the community. The traditional description of state police power does embrace the regulation of morals as well as the health, safety, and general welfare of the citizenry. See, e. g., *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365, 395 (1926). And much legislation—compulsory public education laws, civil rights laws, even the abolition of capital punishment—are grounded at least in part on a concern with the morality of the community. But the State’s interest in regulating morality by suppressing obscenity, while often asserted, remains essentially unfocused and ill-defined. And, since the attempt to curtail unprotected speech necessarily spills over into the area of protected speech, the effort to serve this speculative interest through the suppression of obscene material must tread heavily on rights protected by the First Amendment.

In *Roe v. Wade*, 410 U. S. 113 (1973), we held constitutionally invalid a state abortion law, even though we were aware of

“the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One’s philosophy, one’s experiences, one’s exposure to the

raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion." 410 U. S., at 116.

Like the proscription of abortions, the effort to suppress obscenity is predicated on unprovable, although strongly held, assumptions about human behavior, morality, sex, and religion.²⁷ The existence of these assumptions cannot validate a statute that substantially undermines the guarantees of the First Amendment, any more than the existence of similar assumptions on the issue of abortion can validate a statute that infringes the constitutionally-protected privacy interests of a pregnant woman.

If, as the Court today assumes, "a state legislature may . . . act on the . . . assumption that . . . commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior," *Paris Adult Theatre v. Slaton*, ante, at 13-14, then it is hard to see how state-ordered regimentation of our minds can ever be forestalled. For if a State may, in an effort to maintain or create a particular moral tone, prescribe what its citizens cannot read or cannot see, then it would seem to follow that in pursuit of that same objective a State could decree that its citizens must read certain books or must view certain films. Cf. *United States v. Roth*, 237 F. 2d 796, 823 (CA2 1965) (Frank, J., concurring). However laudable its goal—and that is obviously a question on which reasonable minds may differ—the State cannot proceed by means that violate the Constitution. The

²⁷ See Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Col. L. Rev. 391, 395 (1963).

precise point was established a half century ago in *Meyer v. Nebraska*, 262 U. S. 390 (1923).

"That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means.

"For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: 'That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.' In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the

people of a State without doing violence to both letter and spirit of the Constitution." *Id.*, at 401-402.

Recognizing these principles, we have held that so-called thematic obscenity—obscenity which might persuade the viewer or reader to engage in "obscene" conduct—is not outside the protection of the First Amendment:

"It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing." *Kingsley Int'l Pictures Corp. v. Regents*, 360 U. S. 684, 688-689 (1959).

Even a legitimate, sharply focused state concern for the morality of the community cannot, in other words, justify an assault on the protections of the First Amendment. Cf. *Griswold v. Connecticut*, 381 U. S. 479 (1965); *Eisenstadt v. Baird*, 405 U. S. 438 (1972); *Loving v. Virginia*, 388 U. S. 1 (1967). Where the state interest in regulation of morality is vague and ill-defined, interference with the guarantees of the First Amendment is even more difficult to justify.³⁸

³⁸ "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire

In short, while I cannot say that the interests of the State—apart from the question of juveniles and unconsenting adults—are trivial or nonexistent, I am compelled to conclude that these interests cannot justify the substantial damage to constitutional rights and to this Nation's judicial machinery that inevitably results from state efforts to bar the distribution even of unprotected material to consenting adults. *NAACP v. Alabama*, 377 U. S. 288, 307 (1964); *Cantwell v. Connecticut*, 310 U. S. 296, 304 (1940). I would hold, therefore, that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the state and federal governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly "obscene" contents. Nothing in this approach precludes those governments from taking action to serve what may be strong and legitimate interests through regulation of the manner of distribution of sexually oriented material.

VI

Two Terms ago we noted that

"[T]here is developing sentiment that adults should have complete freedom to produce, deal in, possess and consume whatever communicative materials may appeal to them and that the law's in-

fer. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago*, 337 U. S. 1 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." *Tinker v. Des Moines Indep. Commun. School Dist.*, 393 U. S. 503, 508-509 (1969). See also *Cohen v. California*, 403 U. S. 15, 23 (1971).

volvement with obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age. The concepts involved are said to be so elusive and the laws so inherently unenforceable without extravagant expenditures of time and effort by enforcement officers and the courts that basic reassessment is not only wise but essential." *United States v. Reidel*, 402 U. S. 351, 357 (1971).

Nevertheless, we concluded that "the task of restructuring the obscenity laws lies with those who pass, repeal, and amend statutes and ordinances." *Ibid.* But the law of obscenity has been fashioned by this Court—and necessarily so under our duty to enforce the Constitution. It is surely the duty of this Court, as expounder of the Constitution, to provide a remedy for the present unsatisfactory state of affairs. I do not pretend to have found a complete and infallible answer to what Mr. Justice Harlan called "the intractable obscenity problem." *Interstate Circuit, Inc. v. Dallas*, 390 U. S. 676, 704 (1968) (separate opinion). See also *Memoirs v. Massachusetts*, 383 U. S. 413, 456 (1966) (dissenting opinion). Difficult questions must still be faced, notably in the areas of distribution to juveniles and offensive exposure to unconsenting adults. Whatever the extent of state power to regulate in those areas,²⁹ it should be clear that the view I espouse today would introduce a large measure of clarity to this troubled area, would re-

²⁹ The Court erroneously states, *Miller v. California*, ante, at 12, that the author of this opinion "indicates that suppression of unprotected obscene material is permissible to avoid exposure to unconsenting adults . . . and to juveniles . . ." I defer expression of my views as to the scope of state power in these areas until cases squarely presenting these questions are before the Court. See n. 9 supra; *California v. Miller*, ante (dissenting opinion).

duce the institutional pressure on this Court and the rest of the State and Federal judiciary, and would guarantee fuller freedom of expression while leaving room for the protection of legitimate governmental interests. Since the Supreme Court of Georgia erroneously concluded that the State has power to suppress sexually oriented material even in the absence of distribution to juveniles or exposure to unconsenting adults, I would reverse that judgment and remand the case to that court for further proceedings not inconsistent with this opinion.

SUPREME COURT OF THE UNITED STATES

No. 71-1051

Paris Adult Theatre I et al,
Petitioners,

v.

Lewis R. Slaton, District At-
torney, Atlanta Judicial
Circuit, et al.

On Writ of Certiorari to
the Supreme Court of
Georgia.

[June 21, 1973]

MR. JUSTICE DOUGLAS, dissenting.

My Brother BRENNAN is to be commended for seeking a new path through the thicket which the Court entered when it undertook to sustain the constitutionality of obscenity laws and to place limits on their application. I have expressed on numerous occasions my disagreement with the basic decision that held that "obscenity" was not protected by the First Amendment. I disagreed also with the definitions that evolved. Art and literature reflect tastes; and tastes, like musical appreciation, are hardly reducible to precise definitions. That is one reason I have always felt that "obscenity" was not an exception to the First Amendment. For matters of taste, like matters of belief, turn on the idiosyncracies of individuals. They are too personal to define and too emotional and vague to apply, as witness the prison term for Ralph Ginzburg, *Ginzburg v. United States*, 383 U. S. 463, not for what he printed but for the sexy manner in which he advertised his creations.

The other reason I could not bring myself to conclude that "obscenity" was not covered by the First Amendment was that prior to the adoption of our Constitution and Bill of Rights the colonies had no law excluding "obscenity" from the regime of freedom of expression

and press that then existed. I could find no such laws; and more important, our leading colonial expert, Julius Goebel, could find none, J. Goebel, Development of Legal Institutions (7th rev., 1946 ed.); J. Goebel, Felony and Misdemeanor (1937). So I became convinced that the creation of the "obscenity" exception to the First Amendment was a legislative and judicial *tour de force*; that if we were to have such a regime of censorship and punishment, it should be done by constitutional amendment.

People are, of course, offended by many offerings made by merchants in this area. They are also offended by political pronouncements, sociological themes, and by stories of official misconduct. The list of activities and publications and pronouncements that offend someone is endless. Some of it goes on in private; some of it is inescapably public, as when a government official generates crime, becomes a blatant offender of the moral sensibilities of the people, engages in burglary, or breaches the privacy of the telephone, the conference room, or the home. Life in this crowded modern technological world creates many offensive statements and many offensive deeds. There is no protection against offensive ideas, only against offensive conduct.

"Obscenity" at most is the expression of offensive ideas. There are regimes in the world where ideas "offensive" to the majority (or at least to those who control the majority) are suppressed. There life proceeds at a monotonous speed. Most of us would find that world offensive. One of the most offensive experiences in my life was a visit to a nation where bookstalls were filled only with books on mathematics and books on religion.

I am sure I would find offensive most of the books and movies charged with being obscene. But in a life that has not been short, I have yet to be trapped into seeing or reading something that would offend me. I

never read or see the materials coming to the Court under charges of "obscenity," because I have thought the First Amendment made it unconstitutional for me to act as a censor. I see ads in bookstores and neon lights over theatres that resemble bait for those who seek vicarious exhilaration. As a parent or a priest or as a teacher I would have no compulsion in edging my children or wards away from the books and movies that did no more than excite man's base instincts. But I never supposed that government was permitted to sit in judgment on one's tastes or beliefs—save as they involved action within the reach of the police power of government.

I applaud the effort of my Brother BRENNAN to forsake the low road which the Court has followed in this field. The new regime he would inaugurate is much closer than the old to the policy of abstention which the First Amendment proclaims. But since we do not have here the unique series of problems raised by government imposed or government approved captive audiences (Cf. *Public Utilities Comm'n v. Pollak*, 343 U. S. 451), I see no constitutional basis for fashioning a rule that makes a publisher, producer, bookseller, librarian, or movie house criminally responsible, when he or she fails to take affirmative steps to protect the consumer against literature or books offensive* to those who temporarily occupy the seats of the mighty.

*What we do today is rather ominous as respects librarians. The net now designed by the Court is so finely meshed that taken literally it could result in raids on libraries. Libraries, I had always assumed, were macrocosm, representing every part of the spectrum. If what is offensive to the most influential person or group in a community can be purged from a library, the library system would be destroyed.

A few States exempt librarians from laws curbing distribution of "obscene" literature. California's law, however, provides: "Every person who, with knowledge that a person is a minor, or who fails to exercise reasonable care in ascertaining the true age of a minor,

When man was first in the jungle he took care of himself. When he entered a societal group, controls were necessarily imposed. But our society—unlike most in the world—presupposes that freedom and liberty are in a frame of reference that make the individual, not government, the keeper of his tastes, beliefs, and ideas. That is the philosophy of the First Amendment; and it is the article of faith that sets us apart from most nations in the world.

knowingly distributes to or sends or causes to be sent to, or exhibits to, or offers to distribute or exhibit any harmful matter to a minor, is guilty of a misdemeanor." 9 Ann. Calif. Code § 313.1.

A "minor" is one under 18 years of age; the word "distribute" means "to transfer possession"; "matter" includes any book, magazine, newspaper, or other printed or written material." § 313 (b).

"Harmful matter" is defined in § 313 (a) to mean "matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance for minors."

APPENDIX

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DAVID J. HILL, THEATRE I, ET AL.,

Petitioners,

vs.

DAVID R. BLANTON, DISTRICT ATTORNEY,
ATLANTA JUDICIAL DISTRICT, ET AL.,

Respondents.

ON PETIT OF CERTIORARI
FROM THE SUPREME COURT OF GEORGIA

PETITION FOR REHEARING

DAVID J. HILL, THEATRE I and Partis

Bill Theatre II. Petitioners in the

within proceedings, by and through their

attorney present this, their Petition for

rehearing of the above entitled matter,

United States Constitution

First Amendment

First Amendment

Minority Report of
the Commission on Obscenity and
Pornography

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-1051

PARIS ADULT THEATRE I, ET AL,

Petitioners,

vs.

LEWIS R. SLATON, DISTRICT ATTORNEY,
ATLANTA JUDICIAL CIRCUIT, ET AL,

Respondents.

ON WRIT OF CERTIORARI
FROM THE SUPREME COURT OF GEORGIA

PETITION FOR REHEARING

Paris Adult Theatre I and Paris
Adult Theatre II, Petitioners in the
within proceedings, by and through their
counsel present this, their Petition for
a rehearing of the above entitled cause,

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-1081

JAMES EARL RAY, ET AL.,
Petitioners,

vs.

JOHN A. EDGAR, DISTRICT ATTORNEY,
ALABAMA JUDICIAL CIRCUIT, ET AL.,

Respondents.

ON WRIT OF CERTIORARI
FROM THE SUPREME COURT OF ALABAMA

PETITION FOR REHEARING

JAMES EARL RAY, ET AL.,

James Earl Ray, et al., Petitioners in the

above proceedings, by and through their

attorneys, present this, their petition for

rehearing of the above entitled case.

and in support thereof respectfully show:

The decision and order of this Honorable Court was issued on June 21, 1973 and the majority of the Court concluded the text of the opinion with the following sentence:

"The judgment is vacated and the case remanded to the Georgia Supreme Court for further proceedings not inconsistent with this opinion and Miller v. California, supra. See United States vs. 12-200 Ft. Reels, U.S. _____, (p. 7, n.7) (1973)."

The petition for rehearing of decision and judgment of this Court is filed pursuant to Rule 58(1) of the U. S. Supreme Court Rules and is being submitted within twenty-five (25) days after entry of judgment as required.

As grounds for this petition, Petitioners respectfully request the

and in support thereof respectfully submit:

The decision and order of this

Honorable Court was issued on June 21, 1973
and the majority of the Court concluded
the text of the opinion with the following

language:

"The judgment is vacated
and the case remanded to
the Georgia Superior Court
for further proceedings
not inconsistent with
this opinion and Miller
v. California, supra.
See United States vs.
12-200 P. Reels,
12-200 P. Reels,
12-200 P. Reels, 12-200 P. Reels."

The petition for rehearing of

decision and judgment of this Court is

filed pursuant to Rule 26(1) of the S. C.

Georgia Court Rules and is being submitted

within twenty-five (25) days after entry

of judgment as required.

As grounds for this petition,

petitioners respectfully request the

Court's consideration of the following:

I.

THE VACATION OF THE JUDGMENT
IN THIS CASE AND THE REMAND
TO THE GEORGIA SUPREME COURT
FOR "FURTHER PROCEEDINGS"
LEAVES UNCONSTITUTIONALLY
VAGUE WHAT THE DUTY IS THAT
IS IMPOSED UPON THE APPELLATE
COURT WITH REGARD TO "FURTHER
PROCEEDINGS."

This Court concluded its decision of the Court in this case with the following ruling:

"The judgment is vacated
and the case remanded to
the Georgia Supreme Court
for further proceedings
not inconsistent with
this opinion and Miller
vs. California, supra.
See United States vs.
12-200 Ft. Reels, _____ U.S.
_____, (p.7, n. 7)"

One reading the decisions of
this Court promulgated on June 21, 1973
and the viewing of the actions of this
Court invacating and remanding to the

Consideration of the following:

THE VACATION OF THE JUDGMENT
IN THIS CASE AND THE REMAINING
TO THE GEORGIA SUPREME COURT
FOR FURTHER PROCEEDINGS
LEAVES UNCONSTITUTIONALLY
ABOUT WHAT THE DUTY IS THAT
IS IMPOSED UPON THE APPELLATE
COURT WITH REGARD TO FURTHER
PROCEEDINGS.

This Court concluded in fact-

... of the Court in this case with the

following result:

The judgment is vacated
and the case remanded to
the Georgia Supreme Court
for further proceedings
not inconsistent with
this opinion and either
re. California, supra,
see United States v.
11-500 P.2d 841, 35
(9-7-67).

One reading the decision of

this Court promulgated on June 11, 1973

and the viewing of the actions of the

Court investigating and responding to the

lower courts of approximately sixty (60) other obscenity cases for "further proceedings" would most assuredly be left in a quandary as to what the various State and federal appellate courts are supposed to do with the cases upon remand.

Several possibilities may be suggested as to what the Court has done by its decision to the case at bar. If the action of the Court viewed by competent counsel for the various parties and others similarly situate, provokes a sharp difference of opinion as to the intended and probable effect of the various decisions, how then can men and women not trained in the law understand the exquisite and subtle meaning suggested by the plain words of the decisions. Among the possible inferences to be drawn as to what the "further proceedings" are that are to be considered by the Georgia Supreme Court in the case

lower courts of approximately sixty (60)
other secondary cases for "further proceed-
ings" would most assuredly be left in a
doubtful as to what the various state and
federal appellate courts are supposed to do
with the cases upon remand.

Several possibilities may be
suggested as to what the Court has done by
its decision in the case at bar. If the
action of the Court viewed by competent
counsel for the various parties and others
similarly situated, provoked a sharp dis-
turbance of opinion as to the intended and
probable effect of the various decisions,
how then can men and women not trained in
the law understand the expressive and subtle
meaning suggested by the plain words of
the decisions. Having the possible inter-
ference to be drawn as to what the "further
proceedings" are that are to be considered
by the Georgia Supreme Court in the case

at bar are the following:

- A. THE GEORGIA SUPREME COURT
MAY REVIEW THE EVIDENCE TO
DETERMINE WHETHER THE
MOTION PICTURE FILMS ARE
OBSCENE IN THE CONSTITUTIONAL
SENSE UNDER THE NEWLY
ANNOUNCED TRI-PARTITE TEST
SET FORTH IN MILLER VS.
CALIFORNIA, _____ U.S. _____
(1973).

This view is taken by many prosecutors across the land as judged on the basis of newspaper accounts and as United Press International and Associated Press summaries would indicate.

Counsel for Paris Adult Theatres would reject this suggested approach on the basis that the Georgia statutory scheme, employing as it does the utilization of a statutory definition lifted out of the opinion of the plurality in Memoirs vs. Attorney General, 383 U.S. 431 (1966), would concededly be a more

of the following:

THE GEORGIA SUPREME COURT
MAY REVIEW THE EVIDENCE TO
DETERMINE WHETHER THE
MOTION PICTURE FILMS ARE
OFFENSIVE IN THE CONSTITUTIONAL
SENSE UNDER THE RESULT
ANNOUNCED IN THE CASE THAT
WENT FORTH IN 1951 AS
CALIFORNIA, U.S.
(1951)

This view is taken by many people
across the land as judged on the
basis of newspaper accounts and an United
States International and Associated Press
statement would indicate.

Counsel for the Adult Theater
would reject this suggested approach as
the basis that the Georgia Attorney
General, employed as it does the rights
of a majority definition listed out
of the opinion of the minority in
Harris vs. Attorney General, 195 U.S.
157 (1955), would concede as a matter

liberal test than the permissible scope of regulation set forth in Miller vs. California, supra., and the Georgia Supreme Court could hardly be expected to find the motion picture films involved in this case to be protected expression under this less liberal and more restrictive doctrine.

If this were the intended and probable course of action envisioned by the majority of this Court in vacating the judgments and remanding for further proceedings the approximate sixty-eight (68) cases involving obscenity-pornography, as it did on June 21 and June 25, 1973, then each of those sixty-eight (68) cases, together with each and every new case that has already arisen in the interval since the Court's decision and which will continue to arise, will be back to the Court's docket, and the fears of an inundation of obscenity cases as suggested

liberal test than the permissible scope

of regulation set forth in Miller vs.

California, supra, and the Georgia Supreme

Court could hardly be expected to find the

action picture films involved in this case

to be unprotected expression under this test

liberal and more restrictive doctrine.

If this were the intended and

probable course of action envisioned by the

majority of this Court in reaching the

injunction and remanding for further pro-

ceedings the approximate sixty-eight (68)

cases involving obscenity-pornography, as

it did on June 21 and June 22, 1958, cases

each of those sixty-eight (68) cases,

together with each and every new case

that has already arisen in the interval

since the Court's decision and action will

continue to arise, will be back to the

Court's docket, and the fear of an in-

undation of obscenity cases as suggested

by Mr. Justice Brennan and rejected by the majority will no longer be a fanciful guesstimate, but a realistic problem.

- B. THE GEORGIA SUPREME COURT MAY REVIEW THE STATUTE AS ENACTED BY THE LEGISLATURE TO DETERMINE WHETHER IT CAN AUTHORITATIVELY CONSTRUER THE SAME TO ENGRAFT UPON IT THE CONSTITUTIONAL STANDARDS SET FORTH IN MILLER VS. CALIFORNIA, WHILE NOT APPLYING THE PURELY PROSPECTIVE RULING TO THE PARTIES BEFORE THE COURT.

This Court, by its majority opinion in vacating and remanding the judgment of the Georgia Supreme Court in the case at bar, made special effort to refer to the parties (n.7, p. '7 of the slip opinion in U. S. v. 12-200 Ft. Reels).

The footnote reads in pertinent part as follows:

by Mr. Justice Brennan and rejected by
the majority with no dissent or dissent-
in-part, but a realistic problem.

THE GEORGIA SUPREME COURT
MAY REVIEW THE STATUTE AS
ENACTED BY THE LEGISLATURE
TO DETERMINE WHETHER IT
CAN AUTHORITATIVELY CONSTRUCT
THE CASE TO ENACT THAT
IT THE CONSTITUTIONAL STATE
MAY BE SET ASIDE IN MILLER
VS. CALIFORNIA, WHILE NOT
APPLYING THE BURDEN PROOF
EFFECTIVE RULING TO THE
PARTIES BEFORE THE COURT.

This Court, by its majority
opinion is vacating and remanding the
judgment of the Georgia Supreme Court in
the case at bar, made special effort to
refer to the parties in U.S. v. 11-100 T.
also opinion in U.S. v. 11-100 T.

The footnote reads in part:
The part as follows:

"We further note that, while we must leave to State courts the construction of State legislation, we have a duty to authoritatively construe federal statutes where 'a serious doubt of constitutionality is raised. . . 'and construction of the statute is fairly possible by which the question may be avoided.'

If we are to take that part of the note and apply it to the case at bar, it would lend support to the theory that this Court's action in vacating and remanding for further proceedings was intended to permit the Georgia Supreme Court to make an authoritative judicial construction of a State statute.

It would appear that the necessity which compelled this Court to enunciate new constitutional standards for judging obscenity was the recognition by eight (8) members of this Court (excluding

We further note that while we must leave to the State courts the construction of State legislation, we have a duty to authoritatively construe Federal statutes where a serious doubt of constitutionality is raised. And concerning the scope of the statute is fairly possible in which the question may be avoided.

It is not to take that part of the note and apply it to the case at bar. It would tend support to the theory that this Court's action in vacating and remanding the further proceedings was intended to bring the Georgia Supreme Court to have an authoritative judicial construction of a State statute.

It would appear that the necessity which compelled this Court to grant are new constitutional standards for good and especially was the recognition by some members of this Court (excluding

Mr. Justice Douglas, whose dissent was upon other grounds) that the standards for judging obscenity were unconstitutionally vague and failed to give "fair warning" to an individual that his proposed course of conduct would subject him to criminal prosecution.

It was only as to the issue of how the vagueness problem might be rectified that the justices divided sharply -- five (5) joining in an opinion to set forth a new constitutional definition of obscenity and three (3), including Mr. Justice Brennan, holding that the definition of obscenity was so obscure that it could not be appropriately defined.

Mr. Justice Brennan makes a suggestion in his dissent in Miller vs. California, supra, that all States other than Oregon must now enact new obscenity

Mr. Justice Douglas, whose dissent was
very often grounded that the standards for
judging obscenity were unconstitutionally
vague and failed to give "fair warning" to
an individual that his proposed course of
conduct would subject him to criminal
prosecution.

It was only as to the issue of
how the vagueness problem might be resolved
that the Justices divided sharply -- five
to four -- in an opinion to set forth a
new constitutional definition of obscenity
and three (1), including Mr. Justice
Brennan, holding that the definition of
obscenity was so obscure that it could not
be appropriately defined.

Mr. Justice Brennan takes a
position in his dissent in Miller vs.
California, says that all States other
than Oregon were now and obscenity

statutes and Mr. Chief Justice Burger, in his opinion for the majority, at footnote 6, disagrees with Mr. Justice Brennan's view of the effect of the holding of the majority and adds this caveat:

"Other existing State statutes, as construed heretofore or hereafter, may well be adequate."

If this is the intended and probable meaning of this Court's action in vacating and remanding to the Georgia Supreme Court the within case, then should the Georgia Supreme Court authoritatively construe the State statute to engraft upon it the new standards promulgated, it should not apply to the parties before the Court and should be only view prospectively and not retrospectively.

This Court has stated in Linkletter vs. Walker, 381 U.S. 618 (1965) at

attorneys and Mr. Chief Justice Burger.

in his opinion for the majority, as

expressed a disagreement with Mr. Justice

Brennan's view of the effect of the

holding of the majority and also with

Justice

"Other existing State
statutes, as construed
heretofore or hereafter,
may well be affected."

It is in the intended and

probable meaning of this Court's action

in vacating and remanding to the Georgia

Supreme Court the writs case, then should

the Georgia Supreme Court necessarily

continue the State statute to operate

upon it the new standards promulgated, it

should not apply to the parties before

the Court and should be only prospective

retroactively and not retroactively.

This Court has acted in link

James v. Walker, 351 U.S. 215 (1956) as

page 621:

"A ruling which is purely prospective does not apply even to the parties before the Court."

See also:

England vs. Board of Medical
Examiners, 375 U.S. 411;

Great Northern RR Co. vs.
Sunburst Oil and Refining
Co., 287 U.S. 358.

The newly announced decisions of the U. S. Supreme Court in Miller and Paris represent "a clear break with the past", in the words of Mr. Justice Stewart in Desist vs. U.S.A., 394 U.S. 244, 248 (1969).

Assuming the new constitutionally permissible standards announced by the U. S. Supreme Court to have been unforeseen by the managers of the theatres involved in this case as petitioners on December 28, 1970, then any new construction should be addressed to the prospective ruling only

"A ruling which is purely
prospective does not apply
even to the parties before
the Court."

See also:

Ex parte vs. Board of Medical
Examiners, 315 U.S. 411
Great Northern Ry. Co. vs.
Swainson Oil and Refining
Co., 191 U.S. 338.

The newly announced decision of
the U. S. Supreme Court in Miller and
Wright "a clear break with the past," in
the words of Mr. Justice Stewart in dissent
in U.S.A. vs. 324 U.S. 244, 248 (1955).

Assuming the new constitutionally
permissible standards announced by the
U. S. Supreme Court to have been understood
by the managers of the churches involved in
this case as petitioners on December 18,
1950, then any new constitution should be
addressed to the prospective ruling only

and this Court should so state prior to the matter being considered by the Georgia Supreme Court on remand.

C. THE GEORGIA SUPREME COURT UPON FURTHER PROCEEDINGS ON REMAND OF THIS CASE IS TO DISMISS THE SAME IN THAT AN AMNESTY FACTOR IS INVOLVED.

Mr. Chief Justice Burger, in the majority opinion in the case at bar, points to the prospective operation of the newly announced constitutional standard after either future legislative enactment or authoritative judicial construction, when he said:

"Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating State law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice

and this Court should be aware of the fact that the matter being considered by the Georgia Supreme Court on remand.

THE GEORGIA SUPREME COURT
FROM FURTHER PROCEEDINGS
ON REMAND OF THIS CASE IS
TO DISMISS THE SAME IN
THEIR ENTIRETY WITHOUT
ANY FURTHER ACTION
BEING TAKEN.

Mr. Chief Justice Burger, in

the majority opinion in the case at bar,

points to the prospective operation of

the newly announced constitutional amendment

and states that future legislative action

will be authoritative judicial construction

when he said:

"Under the holding announced
today, no one will be sub-
ject to prosecution for the
sale or exposure of obscene
materials unless these materials
are depicted or described
patently offensive 'hard core'
sexual conduct specifically
defined by the regulating
State law, as written or con-
strued. We are satisfied
that these specific provisions
will provide fair notice

to a dealer in such materials that his public and commercial activities may bring prosecution. See Roth v. United States, supra, 354 U.S. at 491-492 (1957)."

A fair reading of the quote would suggest that the Court recognized that the standards under which the materials at bar were judged were unconstitutionally vague and pointed merely to the prospective operation of any obscenity statute.

By the action of the Court in vacating and remanding back approximately sixty-eight (68) cases involving both questions and procedures in substance, it would appear that the Court could be allowing an amnesty for the past with the abatement of Redrup and its concepts and the decisional law under Redrup and starting forth under a new set of rules which would apply merely prospectively.

to a dealer in such manner
as to place his public and
commercial activities in
being prosecuted, see
Holt v. United States, 200 U.S.
301 (1906).

A fair reading of the whole would
suggest that the Court recognized that the
standards under which the materials at bar
were judged were unconstitutionally vague
and pointed merely to the prospective
operation of any obscenity statute.

By the action of the Court in ve
cating and returning back approximately
twenty-five (25) cases involving both
questions and answers in substance,
it would appear that the Court could be
affording an answer for the past with the
statement of Reid and the concepts and
the definitions law under Reid and other
and forth under a new set of rules which
would apply merely prospectively.

- D. THE GEORGIA SUPREME COURT ON FURTHER PROCEEDINGS ON THE REMAND OF THIS CASE IS TO DETERMINE WHETHER THE NEWLY ANNOUNCED CONSTITUTIONAL CRITERIA FOR JUDGING OBSCENITY APPLY IN THE ABSENCE OF A MODE OF DISSEMINATION WHICH CARRIES WITH IT THE SIGNIFICANT DANGER OF OFFENDING THE SENSIBILITIES OF UNWILLING RECIPIENTS OR OF EXPOSURE TO JUVENILES.

In the Miller case, to which this Court has constantly made reference throughout the holding of the opinion in the within matter, after recitation of the factual summary of the matters involved in that case, in the opinion of the majority under Roman Numeral I, states as follows:

"This case involves the application of a State's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials. This Court has

D. THE GEORGIA SUPREME COURT
ON FURTHER PROCEEDINGS ON
THE REMAND OF THIS CASE
IS TO DETERMINE WHETHER
THE NEWLY ANNOUNCED CONSTITUTIONAL
CRITERIA FOR JUDGING
OBSCENITY APPLY IN THE
ABSENCE OF A MORE
DISSEMINATION WHICH CARRIES
WITH IT THE SIGNIFICANT
DANGER OF OFFENDING THE
SENSITIVITIES OF UNWILLING
RECIPIENTS OR OF EXPOSURE
TO JUVENILES.

In the Miller case, in which this
Court has constantly made reference through-
out the holding of the opinion in the with-
in matter, after recitation of the factual
nexus of the matters involved in these
cases, in the opinion of the majority under
Roman numeral 3, states as follows:

"This case involves the
application of a State's
criminal obscenity statute
to a situation in which
sexually explicit materials
have been thrust by aggres-
sive sales action upon un-
willing recipients who had
in no way indicated any
desire to receive such ma-
terials. This Court has

recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. Stanley v. Georgia, 394 U.S. 557, 567 (1969). Ginsberg v. New York, 390 U.S. 629, 637-643 (1968). Interstate Circuit, Inc., v. Dallas, supra, 390 U.S. at 690 (1968). Redrup v. New York, 386 U.S. 767, 769 (1967). Jacobellis v. Ohio, 378 U.S. 184, 195 (1964). See Rabe v. Washington, 405 U.S. 313, 317 (1972) (Burger, C.J. concurring); United States v. Reidel, 402 U.S. 351, 360-362 (Marshall, J., concurring) (1971); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952). Breard v. Alexandria, 341 U.S. 662, 644-645 (1951); Kovacs v. Cooper, 336 U.S. 77, 88-89 (1949); Prince v. Massachusetts, 321 U.S. 158, 169-170 (1944). Cf. Butler v. Michigan, 352 U.S. 380, 382-383 (1957); Public Utilities Comm'n v. Pollak, 343 U.S. 451, 464-465 (1952). It is in this context that we are called on to define the standards which must be used to identify obscene material that a State may regulate

without infringing the First Amendment as applicable to the States through the Fourteenth Amendment."

In light of the foregoing, which seemingly is a condition precedent to the enforcement of a State's obscenity laws, the Court speaks of the context in which they define the standards which must separate the protected from the unprotected under the First Amendment.

If the language of the Court in utilizing the term "it is in this context that we are called on to define the standards which must be used. . ." has particular significance, it would seem to be at odds with the terminology set forth as the rationale for permitting a State to regulate obscenity set forth in the opinion of the Court in the within case.

The question is thus presented how do we reconcile and how can the Georgia

without regarding the First
Amendment as applicable to
the States through the
Fourteenth Amendment.

Is this of the foregoing?

which seemingly is a condition precedent
to the enforcement of a State's character
laws, the Court speaks of the extent in
which they define the standards which
must separate the prohibited from the per-
mitted under the First Amendment.

Is the language of the Court
in defining the term "is in each case"
such that we are called on to define the
standards which must be used? "has
particular significance, it would seem to
be in order with the terminology set forth
as the rationale for permitting a State to
restrict obscenity set forth in the
opinion of the Court in the Miller case.

The question is thus presented.

How do we determine and how can the standards

Supreme Court, without further guidance from this Court, reconcile a seeming inconsistency between the standards context of Miller and rejection of the consenting adults theory seemingly implicit in Paris?

Thus, Petitioners contend that a Motion for Rehearing should be granted and the Court restructure its opinion insofar as setting forth the purpose or the duty of the Georgia Supreme Court, to whom this matter is being remanded for further proceedings not inconsistent with Miller vs. California, supra.

The movie "Carnal Knowledge" was

a Mike Nichols production and received an "A" rating from the Motion Picture Association and received serious and critical

... Court, without further evidence
from this Court, reconcile a seeming in-
consistency between the standards context
of Miller and rejection of the sentencing
theory seemingly implicit in Payne.
Thus, Petitioner's contention that a
... should be granted and
the Court's restrictive use of opinion in order
as setting forth the purpose of the duty
of the Georgia Supreme Court, to whom this
matter is being remanded for further pro-
ceedings not inconsistent with Miller vs.
Georgia, supra.

II.

THE GEORGIA SUPREME COURT, AFTER JUNE 21, 1973 BUT PRIOR TO THE MANDATE HEREIN REMANDING AND VACATING, HAS NOW PURPORTEDLY AUTHORITATIVELY CONSTRUED THE GEORGIA STATE OBSCENITY STATUTE IN A MANNER INCONSISTENT WITH THE STANDARDS FASHIONED BY THIS COURT IN MILLER VS. CALIFORNIA.

The Georgia Supreme Court, on July 3, 1973 in a case entitled Jenkins vs. The State, No. 27692, in a 4-3 decision, held that the Georgia obscenity law was constitutional and that the accusation was framed in the proper language and that the jury's verdict utilizing local community standards of the forum, i.e., Dougherty County, Georgia, was correct in holding that the movie "Carnal Knowledge" was obscene under Georgia Law.

The movie "Carnal Knowledge" was a Mike Nichols production and received an "R" rating from the Motion Picture Association, and received serious and critical

THE GEORGIA SUPREME COURT, AFTER
JUNE 21, 1973 BUT PRIOR TO THE
MINUTE BEHIND REMAINING AND VA-
CATING, WAS NOW FORTHOUGHTLY
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GEORGIA STATE OBSCENITY STATUTE
IN A MANNER INCONSISTENT WITH
THE STANDARDS ESTABLISHED BY THIS
COURT IN MILLER VS. CALIFORNIA.

The Georgia Supreme Court, on

July 1, 1973 in a case entitled Jenkins

vs. The State, No. 27623, in a 4-3 decision

held that the Georgia obscenity law was

unconstitutional and that the occasion was

framed in the proper language, and that the

jury's verdict reflecting local community

standards of the time, i.e., December

County, Georgia, was correct in holding

that the movie "Carnal Knowledge" was ob-

scene under Georgia law.

The movie "Carnal Knowledge" was

a Mike Nichols production and received an

"R" rating from the Motion Picture Association

and received various and official

reviews in many newspapers throughout the United States including The Washington Post, The Evending Star, the New York Times and Atlanta Constitution. The majority of the justices of the Supreme Court of Georgia, in discussing Georgia obscenity statutes, state in pertinent part as follows:

"It is our view that a statute can provide criminal punishment without the definition of obscenity being included within that specific code section. . ."

"The Miller case, supra, further held that juries can consider State or local community standards in lieu of 'national standards' . . ."

"This Court has held that the exhibition of an obscene picture is a crime involving the welfare of the public at large, since it is contrary to the standards of decency and propriety of the community as a whole. . ."

"The Supreme Court of the United States which in effect has affirmed the Paris case, supra, held that the States

... in many newspapers throughout the
... including the Washington Post
... the Evening Star, the New York Times and
... the Nation. The majority of the
... of the Supreme Court of Georgia,
... Georgia's specialty statutes
... in pertinent part as follows:

"It is our view that a statute
... can provide criminal punish-
ment without the definition
of essentially being included
within that specific code
section.

"The Miller case, supra, but
... that held that justice can
... Georgia or local case
... standards in lieu of
national standards.

"This Court has held that the
... of an offense gov-
erns is a crime involving
the welfare of the public at
large, and is in contrast
to the standards of decency
and propriety of the commu-
nity as a whole.

"The Supreme Court of the
United States which in Miller
has affirmed the Robinson
Court held that the Robinson

have a legitimate right in regulating commerce and obscene materials. . . ."
(Emphasis supplied.)

"We hold that the evidence in this record amply supports the verdict of guilty by the showing of the film 'Carnal Knowledge', in violation of the definition of distributing obscene materials under our Georgia statutes. . . ."

As stated, this was a 4-3 decision and the foregoing comments were taken from the majority opinion. The following comments are taken from the dissenting opinion:

"Today's majority decision has drastically narrowed the concept of the First Amendment as applied to the performing arts in Georgia and 'local communities' in Georgia. . . ."

"The decision of the Supreme Court of the United States in Miller vs. California, supra, inaugurated a new era in the continuing constitutional contest between obscenity-pornography and the First Amendment. . . ."

have a legitimate right in
regulating commerce and
obscene materials.
(Emphasis supplied.)

"We hold that the evidence
in this record amply supports
the verdict of guilt by the
grand jury. The evidence
presented, in relation to
the definition of obscenity
obscene materials under the
Georgia statute.

As stated, this was a 4-3 deci-
sion and the foregoing comments were taken
from the majority opinion. The following
comments are taken from the dissenting

opinion:

"Today's majority decision has
drastically narrowed the con-
cept of the First Amendment
as applied to the protection
of free speech and 'local
area in Georgia and 'local
community' in Georgia.

"The decision of the Supreme
Court of the United States
in Miller vs. California,
1973, 413 U.S. 15, 40 L. Ed. 2d 755,
13 S.Ct. 1455, 1973-1, 38 USTC ¶13,022,
1973-1 CB 157, is the only
case in the country which
has been cited as authority
for the First Amendment.

"Miller gave a new definition of pornographic unprotected material. Miller laid down basic guidelines for the trier of fact to use in determining what is protected material from what is unprotected material; Miller changed the yardstick. . ."

". . . the Miller criteria had been applied by the majority in this case, affirming the Appellants' conviction. That that can be done, and for the majority to have done it in this case is, in my view, a denial of due process of law to the Appellant."

"To me, this retroactive application of the Miller yardstick has the effect of saying that a theater operator could rely on Jacobellis in January, 1972 in deciding whether to exhibit a film, but in April, 1973, when he was tried before a jury for exhibiting the film, it was all right for the court and jury to completely ignore the standard established by Jacobellis and apply a different standard which had not been enunciated at the time of the trial, and which would not be established by the Supreme Court of the United States until June 21, 1973."

Miller have a new relation
of persons who were
material. Miller said down
based Miller and the
that of last to use in
Miller what is provided
material from what is
related material Miller changed
the material.

The Miller relation had
been applied to the material
in this case, although the
Appellate Court has
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majority to have done it in
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denial of due process of law
to the Appellant.

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cation of the Miller relation
has the effect of saying that
a character operator could rely
on Jacobellis in January,
1957, in deciding whether to
exhibit a film, but in April,
1957, when he was tried before
a jury for exhibiting the
film, it was all right for the
jury and jury to consistently
ignore the standard established
by Jacobellis and apply a
different standard which had
not been announced at the
time of the trial, and which
could not be established
by the Supreme Court of the
United States until June 11,
1957.

"In Division 4 of the Miller opinion, the Chief Justice [Burger] said: 'the dissenting justices sound the alarm of repression. . . these doleful anticipations assume that courts cannot distinguish commerce and ideas protected by the First Amendment from commercial exploitation of obscene material.'"

". . . My experience with this one case teaches me that the alarm of repression was validly sounded; it also teaches me that Miller's majority assumption, that courts can distinguish commerce and ideas that are protected from exploitation from obscene materials that are not protected, is a too optimistic assumption."

See also the commentary in Time Magazine July 16, 1973 at page 73 under the sub-heading "See No Evil," which discusses the Georgia Supreme Court decision.

If the Georgia Supreme Court by its decision of July 3, 1973 has refused to follow the suggestions of the majority of this Court in fashioning new standards under Miller vs. California,

"In Division 4 of the Miller
opinion, the Chief Justice
[Burger] said: 'The dissenting
justices would find the state of
legislation... these [certain]
particulars assume that
courts cannot distinguish
between and those protected
by the First Amendment from
commercial exploitation of
obscene material.'"

"My experience with this
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between and those that are
protected from exploitation
from obscene material,
that are not protected, is
a too optimistic assumption."

See also the commentary in Time Magazine

July 16, 1973 at page 35 under the sub-

heading "See No Evil" which discusses

the Georgia Supreme Court decision.

At the Georgia Supreme Court

by its decision of July 1, 1973 has re-

fused to follow the suggestions of the

majority of this Court in Tennessee new

statute under Miller vs. California.

it is not necessary for this case to be vacated and remanded to determine whether the statute is void for vagueness because of unconstitutionality on its face, and should be held to be such by this Court.

When dealing with a claim of void for vagueness in the pñeumbra of the First Amendment, we must be mindful of a decision of the United States Supreme Court in U.S.A. vs. National Dairy Products Corp., 372 U.S. 29, 32 (1963), wherein the Court stated:

"In this connection we also note that the approach to 'vagueness' governing a case like this is different from that followed in cases arising under the First Amendment. There we are concerned with the vagueness of the statute 'on its face' because such vagueness may in itself deter constitutionally protected and socially desirable conduct. See Thornhill v. [State of] Alabama, 310 U.S. 88, 98, 60 S.Ct. 736, 742, 84 L.Ed. 1093 (1940); N.A.A.C.P. v. Button, 371 U.S. 415, 83 S.Ct. 328 [9 L. Ed. 2d 405] "

it is not necessary for this case to be
 stated and remanded to determine whether
 the statute is void for vagueness because
 of unconstitutionality on its face, and
 should be held to be such by this Court.

When dealing with a claim of
 void for vagueness in the presence of the
 First Amendment, we must be mindful of a
 decision of the United States Supreme
 Court in U.S.A. vs. National Dairy
Products Corp., 375 U.S. 22, 32 (1963),
 wherein the Court stated:

"In this connection we
 also note that the approach
 to 'vagueness' governing a
 case like this is different
 from that followed in
 cases arising under the
 First Amendment. There
 we are concerned with the
 vagueness of the statute
 'on its face' because such
 vagueness may in itself
 deter constitutionally pro-
 tected and socially desir-
 able conduct. See Thornhill
v. State of Alabama, 310
U.S. 88, 89, 60 S.Ct. 736,
742, 84 L.Ed. 1093 (1940).
N.A.A.C.P. v. Houston, 371
U.S. 415, 83 S.Ct. 312

If the Georgia Supreme Court refuses to authoritatively construe the statute in a manner consistent with the rationale of this Court and the standards fashioned in Miller, then this Court should grant the Petition for Rehearing and rule the statute to be repugnant to the Constitution of the United States for vagueness.

III.

THIS COURT SHOULD GRANT A REHEARING OR, IN THE ALTERNATIVE, MODIFY ITS DECISION TO HOLD THAT THE MOTION PICTURE FILMS INVOLVED IN THE CASE AT BAR ARE OR WERE PROTECTED EXPRESSION CONSISTENT WITH THE RULINGS OF THE MAJORITY OF THIS COURT IN THE THIRTY-ONE CASES FOLLOWING REDRUP VS. PEOPLE OF THE STATE OF NEW YORK, 386 U.S. 767.

This case arose in December, 1970 and was tried and decided by the lower court on the basis of Redrup vs. People of the State of New York. The

12

11 The American Express Company is

issued to authoritatively consider the
matter in a manner consistent with the
principles of this Court and the standards
established in Miller, then the Court
should grant the petition for rehearing
and this the case to be presented to
the Court of the United States

for rehearing.

III.

THIS COURT SHOULD GRANT A
REHEARING OR, IN THE ALTERNATIVE,
MODIFY ITS DECISION
TO HOLD THAT THE MOTION
FOR REHEARING IS
WARRANTED BY THE FACTS OF THE
CASE AT BAR AND OR WHERE
REHEARD REHEARING COME
SISTENT WITH THE HOLDINGS OF
THE MAJORITY OF THIS COURT
IN THE THIRTY-ONE CASES
FOLLOWING Miller vs. People
OF THE STATE OF NEW YORK,
100 U.S. 101

This case arose in December,

1875 and was tried and decided by the

Justice on the basis of People vs.

People of the State of New York, the

25

court found that this was a close case and as such it was to look to the circumstances of dissemination to determine whether or not the material fell on the unprotected side of the ledger. Setting as a fact finder and determining that there was no 'pandering, no intrusion into the privacy of unwilling adults or dissemination of the materials to juveniles, the court concluded that the materials could not be said to be obscene in the constitutional sense.

Whatever this Court has done to reject the casual approach of Redrup, the reliance upon the court's actions in the Redrup series of cases, the material should be viewed in the context of those materials declared by the majority of the court in each of the cases not to be obscene in the case at bar. Whatever change of standards is promulgated for the future, the failure of this Court to

Don't forget that this was a class case and

as such it was to look to the circumstances

of discrimination to determine whether or not

the material fell on the unprotected side

of the ledger. Seeing as a fact finder

and determining that there was no "gender"

no distinction in the privacy of unwilling

sexual or discrimination of the materials to

viewing, the court concluded that the

materials would not be said to be obscene

in the nonfunctional sense.

Whatever this Court has done to

correct the narrow approach of Bessie, the

relation upon the court's action in the

being series of cases, the material

should be viewed in the context of these

materials declared by the majority of the

court in each of the cases not to be ob-

scene in the case at bar. Whatever

degree of standards is promulgated for

the future, the failure of this Court to

rule on the issue of the obscenity of the materials in light of the Redrup series of cases as those cases appeared through 1970, should be the subject for rehearing and reconsideration in the interests of the Petitioners' First and Fifth Amendment rights.

CONCLUSION

Petitioners herein would reiterate all of the constitutional arguments presented but not heretofore discussed in this Petition for Rehearing, set forth in their Petition for Certiorari and Brief, and ask the Court to reconsider all of those arguments on the question of rehearing.

Since the decision of this Court, which created as many new questions and problems as it apparently purported to solve, the following acts have occurred

rule on the issue of the necessity of the
petitioner in light of the leading cases of
cases as those cases appeared through 1770,
should be the subject for rehearing and re-
consideration in the interests of the
petitioners' First and Fifth Amendments.
Hopes.

CONCLUSION

Petitioners herein would re-
iterate all of the constitutional argu-
ments presented but not rehearings dis-
missed in this Petition for Rehearing,
and fourth in their Petition for Certiorari
and writ of Habeas Corpus, and ask the Court to
reconsider all of those arguments on the
question of rehearing.
Since the decision of this
Court, which created so many new questions
and problems as it apparently purposed
to solve, the following acts have occurred

at the instigation of law enforcement officials:

(a) In Louisville, Kentucky, on Friday, July 13, 1973, approximately 200,000 magazines and books were burned on ex parte order of a trial judge without notice to the defendants. All of these books and magazines had been the subject of seizures without search warrants; and the prosecutorial practice employed there was condemned by the U. S. Supreme Court in Rhoaden vs. Kentucky, decided on June 25, 1973;

(b) A prosecutor entered an adult bookstore in Knoxville, Tennessee and seized under a general warrant approximately 873 different books and magazines which he felt, in his opinion, were obscene employing the Roth-Memoirs test; This was done on approximately June 26, 1973. After the seizure of one copy of

at the investigation of the enforcement
of the law.

(a) In Louisville, Kentucky, on

Friday, July 13, 1934, approximately

500 000 magazines and books were printed

on a large order of a trial judge without

notice to the defendant. All of these

books and magazines had been the subject

of seizures without search warrants, and

the prosecutorial practice employed there

was condemned by the U. S. Supreme Court

in Whippen vs. Kentucky, decided on

June 28, 1933.

(b) A prosecutor arrived in Louisville

on Monday in Louisville, Tennessee and

arrived under a general warrant approxi-

mately 800 different books and magazines

which he felt, in his opinion, were

obscene according to the North American test.

This was done on approximately June 15,

1933. After the seizure of one copy of

each publication, the court issued an injunction prohibiting the sale or exhibition of any remaining copies of the books and magazines seized, thus creating a total prior restraint;

(c) On or about June 22, 1973, the mayor of Macon, Georgia led a raid on several supermarkets and made seizures and arrests for "Playboy" and "Oui" magazines;

(d) On or about June 28, 1973 the district attorney arrested the proprietor of a 7-11 foodstore in Savannah, Georgia under the Georgia obscenity law for selling a mild sex scandal newspaper entitled the "National Insider;"

(e) On or about June 23, 1973, a prosecuting attorney in Montgomery, Alabama arrested the proprietor of a magazine stand in the Greyhound Bus Terminal on the charge of selling "Playboy"

also petition, the court issued an order
prohibiting the sale of exhibition
of any remaining copies of the books and
magazines seized, thus creating a total
ban on the sale.

(c) On or about June 12, 1933, the
court of Georgia issued a writ of
seizure against the books and magazines and
magazines for "Pity" and "Only" magazines.

(d) On or about June 18, 1933 the
district attorney arrested the proprietor
of a 7-11 bookstore in Savannah, Georgia
under the Georgia obscenity law for selling
a sex scandal newspaper entitled the
"National Insider".

(e) On or about June 22, 1933, a
prosecuting attorney in Montgomery,
Alabama arrested the proprietor of a
magazine stand in the Grayhound Bus
terminal on the charge of selling "Pity".

magazine, in violation of the Alabama obscenity law;

(f) In Charlottesville, Virginia cases have been made during the first week of June against stores which are selling "Playboy" magazine, for violation of the common laws of the Virginia obscenity statutes;

(g) On or about July 1, 1973 in Tulsa, Oklahoma, prosecutors, with the concurrence of the trial judge but without any adversary hearing, seized approximately 100,000 books and magazines representing in all copies of about 1,200 different titles, in the guise of the enforcement of the State of Oklahoma obscenity statutes;

(h) On or about July 11, 1973, the police in Columbus, Georgia seized all books and magazines, as well as store equipment, cash registers and the like,

magazines, in violation of the Alabama

statutes.

(1) In Charlottesville, Virginia

sales have been made during the first week

of June against stores which are notified

"slushy" magazine, for violation of the

common laws of the Virginia community

statutes.

(2) On or about July 1, 1933, in

Miss. Oklahoma, prosecutors, with the

assent of the trial judge but without

any adversary hearing, seized approximately

100,000 books and magazines representing

in all copies of about 1,500 different

titles, in the guise of the enforcement

of the State of Oklahoma community

statutes.

(3) On or about July 11, 1933, the

police in Columbia, Georgia seized all

books and magazines, as well as stores

equipment, cash registers and the like.

in the guise of enforcing the State of Georgia obscenity law;

(i) On or about July 14, 1973, prosecution officials in the City of Birmingham, Alabama seized approximately 20 to 30,000 publications out of an adult bookstore, which represented all copies of the publications, in the guise of enforcing the State of Alabama obscenity statute.

This grouping of events which counsel represents have occurred since June 21, 1973 represent but a small percentage of the number of incidents which have occurred with regularity by over-zealous polic officials and prosecutorial authorities in the guise of enforcing respective State obscenity statutes.

Hopefully, by the time this Court has an opportunity to consider this

in the guise of entering the State of

without opportunity for

the State of Alabama, 1937

prosecution officials in the City of

Montgomery, Alabama, advised approximately

10 to 15,000 publications was at an early

stage, which represented all of the

of the publications in the State of

during the State of Alabama, especially

therefore

This grouping of events which

national representatives have occurred since

and 21, 1937 represent but a small part

of the number of incidents which

have occurred with regularity of over

several public officials and governmental

authorities in the State of Alabama

respective State recently stated

Respectfully, by the time this

part has an opportunity to consider this

Petition for Rehearing after the Court reconvenes in October, we shall be in a position to furnish the Court before that time a documentation of numerous abuses that have occurred in the name of bona fide law enforcement.

These very things to which we point have had and threaten to have the effect of causing a "chilling of speech" and inducing self-censorship, which will stiffen artistic expression and creativeness for the future.

Surely, in the face of these abuses as they can be documented, if we are to await an independent appellate review by the U. S. Supreme Court some two or three years hence as to each one of these matters, there will be nothing left to review because the forces of censorship will have stifled all expression that is in any way related to the sex field.

petition for rehearing after the Court has
granted a writ, we shall be in a position
to furnish the Court before that time a
documentation of numerous abuses that have
occurred in the case of some like law
enforcement.

There very much to which we
must have had and therefore to have
the effect of passing a "shield of
speech" and inducing self-censorship,
which will stifle artistic expression
and responsiveness for the future.

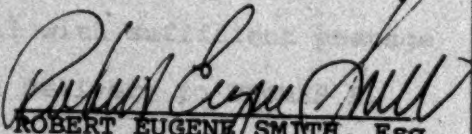
Finally, in the face of these
abuses as they can be documented, it is
not to wait an independent appraiser
review by the U. S. Supreme Court and
on these various issues as to each one of these
matters, there will be nothing left to say
view because the focus of censorship
will have stifled all expression that is
in any way related to the sex field.

The majority makes reference in its decision to the Hill-Link Minority Report of the Commission on Obscenity and Pornography. It is interesting to note that Father Morton Hill, one of the authors of that dissent in a trial in which this counsel participated, when asked to define how he would arrive at what contemporary community standards were in a community, stated that anything that could not appear on public television with children and adults watching, and anything that could not appear on the front page of the daily metropolitan newspaper, would be violative of the contemporary community standard. Father Hill's narrow thinking and restrictions he would impose upon what contemporary community standards were would, if adopted by this Court and permitted to flourish, restrict the level of what adults could read and see to that of children, a view which counsel thought had been rejected by this Court in Butler vs. Michigan, 352 U.S. 380 (1957).

The majority seems to have been
in favor of the Bill. The minority
of the Commission on Un-American Activities
is threatening to vote that Bill. However
Bill, one of the members of that House in
which it is which this House is
has asked to define how he would arrive at
that contemporary community standards were in
community, asked that anything that would
be based on public relations with Bill
and would be watching and anything that
could not appear as the first sign of the
Bill. Metropolitan newspaper, would be
violative of the contemporary community
standards. Father Bill's name is
and restrictions he would impose upon that
contemporary community standards were
Bill. It adopted by the Court and per-
mitted to flourish, restrict the level of
that Bill could read and use to that of
Bill, a view which would be
even rejected by this Court in 1957.

For the reasons stated herein,
as well as predicated on the arguments
contained in the original Petition for
Certiorari and Brief of Petitioners, the
Court should reconsider and grant the
Petition for Rehearing.

Respectfully submitted,



ROBERT EUGENE SMITH, Esq.

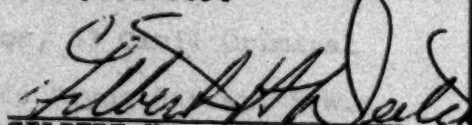
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Attorneys for Petitioners

For the reasons stated herein
as well as professed on the grounds
contained in the original petition for
enrollment and relief of petitioners, the
court should reconsider and grant the
petition for rehearing.

Respectfully submitted,

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[Signature]
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(404) 502-2550

Attorneys for Petitioners



CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the within and foregoing Petition for Rehearing was served upon opposing counsel by placing same in the United States Mail with sufficient postage thereon to ensure delivery to THOMAS E. MORAN, Esquire, Suite 820 Northside Tower, 6065 Roswell Road., N. W., Sandy Springs, Georgia 30328 and THOMAS R. MORAN, Esquire, Assistant Solicitor, 53 Civil Criminal Court Building, 160 Pryor Street, S.W., Atlanta, Georgia 30303, Attorneys for Respondents.

This 16th day of July, 1973.


ROBERT EUGENE SMITH

CERTIFICATE OF SERVICE

This is to certify that a true

and exact copy of the within and foregoing

petition for habeas corpus was served upon

opposing counsel by placing same in the

United States Mail with sufficient postage

thereon to ensure delivery to THOMAS E.

MOORE, Esquire, Suite 415 Northside Tower

4401 Howell Road, N. E., Sandy Springs,

Georgia 30318 and THOMAS E. MOORE, Esquire,

Assistant Solicitor, 221 First Criminal

Court Building, 180 Pryor Street, S.W.,

Atlanta, Georgia 30303, respectively for

recordation.

This 15th day of July, 1971

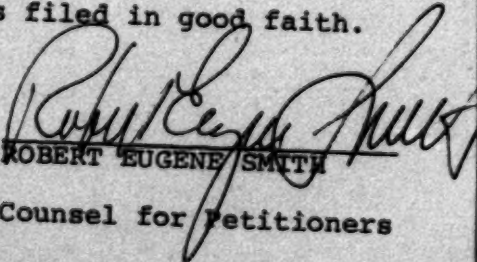
ROBERT ELLIOTT SMITH

CERTIFICATE OF COUNSEL

ROBERT EUGENE SMITH, one of the attorneys for Petitioners, does state and affirm that the Petition for Rehearing to which this certificate is attached is presented by counsel to the Court in good faith and not for the purposes of delay.

The decision of the Court in this case in which a rehearing is sought was a clear departure from the prior decisions of this Court, and was reached by a sharply divided Court.

The circumstances are such that it should be patently clear that the within Petition is filed in good faith.



ROBERT EUGENE SMITH

Counsel for Petitioners